

(1952) 12 PAT CK 0003
In the Patna High Court
Case No : A.F.A.D. No. 514 of 1949

Union of India (UOI)

APPELLANT

Vs

Serajuddin and Another

RESPONDENT

Date of Decision : 15-12-1952

Acts Referred:

Contract Act, 1872 — Section 151, 152
Railways Act, 1890 — Section 72

Citation : AIR 1953 Patna 206 : (1953) 1 BLJR 81

Hon'ble Judges : Sinha, J

Bench : Single Bench

Advocate : Nitai Chandra Ghosh and P.K. Bose, for the Appellant; M. Rahman, for the Respondent

Final Decision : Dismissed

Judgement

Sinha, J.—This is a defendant's appeal against the judgment and decree of the First Additional Subordinate Judge of Patna affirming the decree for compensation for damages passed against the appellant.

2. The plaintiffs' case is that they are proprietors of a general merchant's shop known as "S. Bashiruddin and Sons" in Murdapur, Patna, and that the Imperial Tobacco Company Ltd. of Muzarfarpur booked a consignment of four cases of cigarettes weighing 5 maunds 13 seers from Muzaffarpur to Mahendru Ghat at Patna as per invoice No. 46 dated the 10th of July, 1945, at railway risk. Another consignment of cigarettes weighing 1 maund 10 seers was booked by the said company at Muzaffarpur to Mahendru Ghat as per invoice No. 73 dated 6-8-1945) at railway risk. In both the cases the railway receipts were endorsed in favour of the plaintiffs. It appears that the goods under invoice No. 46 arrived at Mahendru Ghat on 14-7-1945, and when the plaintiffs went to take delivery of it on 26-7-1945, they found the goods damaged and they wanted open delivery which was refused. On 23-8-1945, the plaintiffs wrote a letter to the Traffic Manager requesting for open delivery. On 27-9-1945, the Traffic Manager passed

orders deputing the Commercial Inspector to give open delivery. Open delivery was offered on 4-10-1945, and it was found that 3 seers of cigarettes were short and one of the cases was in damaged condition.

The consignment covered by invoice No. 73 had reached Mahendru Ghat on 9-8-1945. In this case also the plaintiffs refused to take delivery on 23-8-1945, and wanted open delivery which was refused. Upon the letter of the plaintiffs requesting the Traffic Manager to give open delivery, open delivery was offered on 4-10-1945, and it was found that 760 cigarettes were short. In both the cases, the plaintiffs refused to take delivery on the ground that the contents were rotten and unfit for human consumption. Thereafter, it appears Claims Supervisor was deputed by the defendant railway company to Mahendru Ghat and the plaintiffs took delivery of only one case of cigarettes under invoice No. 46 and refused to take delivery of 3 cases of "sportsman" cigarettes on the ground that they were rotten and not fit for human consumption. The entire consignment under invoice No. 73 was refused on the same ground. The plaintiffs charged the railway administration with pilferage, gross negligence and misconduct in regard to the goods.

3. The defence was that notices required u/s 77 of the Railways Act and Section 80, Civil P.C., had not been served by the plaintiffs, that the suit was barred by limitation and that the railway administration was not guilty of misconduct or pilferage of the goods.

4. The first Court held that notices u/s 77, Railways Act, and Section 80, Civil P.C., had in fact been served, that the suit was not barred by limitation, and that the railway administration was guilty of misconduct because the pilferage took place while the goods remained in the care of the railway company and during carriage from Muzaffarpur to Mahendru Ghat. It accordingly, decreed the suit.

5. The questions about the maintainability of the suit, limitation and want of notices u/s 77, Railways Act and Section 80, Civil Procedure Code, were reiterated by the defendant-appellant in the Court below. It was further contended that the railway administration was not liable for any damages to the plaintiffs. The Court below held that the suit was maintainable that the notices had been served, that the suit was within time, and further that "it was the railway company who are responsible for the damage done to the goods as they did not give open delivery till 4-10-45." It also held that the cigarette cases remained on the jetty during the entire monsoon which was open from all sides and its roofing was of corrugated iron sheets and due to rains the packages containing the cigarettes became wet and rendered wholly unfit for human consumption. The learned Subordinate Judge, upon a consideration of the evidence, held that by its own conduct the railway company was estopped from urging that the plaintiffs as consignees were not entitled to take open delivery, and that, in that view of the matter, the authority of -- *Badridas Firm of Purulia Vs. Governor-General for India in Council*, had no application.

6. Mr. Ghosh, on behalf of the appellant, has contended that the Court below is entirely wrong in holding that the railway company was estopped from urging that the plaintiffs were not entitled to open delivery. I am in agreement with the contention of Mr. Ghosh. I think, it is now established beyond doubt, upon the authority of the case law, that the consignee is not entitled to open delivery, and the authorities for this proposition are to be found in -- *Badridas Firm of Purulia Vs. Governor-General for India in Council*, , -- "*Sri Gangaji Cotton Mills Co. Ltd. v. E. I. Rly. Co.* AIR 1922 All 514 (B) and -- *Governor-General in Council Vs. Firm Badri Das Gauri Dutt*, . I would accordingly hold that the plaintiffs in this case were not entitled to claim open delivery.

But that finding in favour of the appellant does not absolve them from being made liable for damages for compensation for the deterioration of the goods. The Court below has found as a fact that since the consignments reached Mahendru Ghat, throughout the whole of the monsoon they were kept on an open jetty having tinned roof, and that because of the winds and rains the consignments were damaged to an extent which made them unfit for human consumption. There is no doubt about the position of the railway administration, and their position as a carrier is the same as that of a bailee. Section 151 of the Indian Contract Act runs as follows:

"In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed."

In the present case, in my opinion, the railway administration failed entirely to take the care that they should have taken. Mr. Ghosh, suggested that there was no other place where the goods could have been kept. In my opinion, that is no answer. If the position of the railway administration was that of a bailee, they should have taken care of the goods as they should have taken of their own goods and should have made provision for the safe custody of the goods which they undertook to carry. If these cases of cigarettes had been removed to a place where there was protection from the winds and rains, no damage could have been caused to these goods apart from the damage that had been caused to them already by pilferage during the course of the transit from Muzaffarpur to Mahendru Ghat as found by the Courts below.

Mr. Ghosh has relied upon the case of -- "*E.I. Rly. Co. Calcutta v. Behari Lal Bulaqi Ram* AIR 1926 Lah 512 (D) in support of his contention that where the goods were damaged due to the fact that delivery was not taken in time, the railway company was not bound to pay compensation for damage done to the goods, and that if there is no evidence as to the extent of damage caused by not taking delivery by the consignee and the damage was also attributable to the company, then in that case the company should not be made liable for the whole of the damages. In my opinion, the facts of that case were entirely different. There was no finding by the final Court of fact in that case that the consignment had been damaged because it was not probably taken care of by the railway

company. Mr. Ghosh further relied on -- "Jagannath v. E.I. Rly. Co. AIR 1918 Cal 221 (E). In that case it was held that the consignee was not entitled to re-weighment of the goods and if the goods were damaged because no delivery was taken in time by the consignee, the consignee was in default and, therefore, the railway company was not, liable for damages to the goods.

In the present case, there is no doubt that the plaintiffs had refused to take delivery when the goods arrived, and although they were not entitled to open delivery, the plaintiffs did ask for it and the railway company granted the request, and when the railway officer came to deliver the goods, it was found that most of the packages containing the cigarettes were badly damaged. If the goods had been kept properly in a protected place, no damage could have been caused to the goods. If after the railway company, as bailee, had taken all possible care to protect the goods and the goods had been damaged by the default of the consignee in taking delivery of those goods, Mr. Ghosh would have been right in suggesting that the consignee was not entitled to damages. In this case, however, upon the findings and upon the facts admitted, the railway company left these consignments absolutely to the winds and in the months of monsoon, and the result was that most of the cases were damaged. In that view of the matter, I am unable to hold with Mr. Ghosh that the damage in this case was due to the default of the consignees, the plaintiffs, and the findings of fact by the Courts below in that regard are, in my opinion, unassailable. In the circumstances, I would dismiss this appeal with costs.