
(1979) 10 AHC CK 0020
In the Allahabad High Court
Case No : Second Appeal No. 2449 of 1971

Union of India (UOI)

APPELLANT

Vs

Sobhraj Bhag Chand

RESPONDENT

Date of Decision : 18-10-1979

Acts Referred:

Railways Act, 1890 — Section 47(1), 74(3)
Railways Rules, 1890 — Rule 7

Citation : AIR 1980 All 163

Hon'ble Judges : R.C. Srivastava, J

Bench : Single Bench

Advocate : D. Sanyal, for the Appellant; A.K. Banerjee and S.N. Ganguli, for the Respondent

Final Decision : Dismissed

Judgement

R.C. Srivastava, J.—This is a defendant's second appeal against the judgment and decree passed by the Additional District Judge, Kanpur on 15-3-1971 in Civil Appeal No. 330 of 1966 affirming the decree of the plaintiff for recovery of Rs. 4335.55 passed by the II Civil Judge, Kanpur in O. S. No. 16 of 1964.

2. The plaintiff's case is that it booked a consignment of 341 bags of potatoes on 17-1-1962, for carriage and safe delivery at Bangalore City, The Railway Administration accepted the consignment and undertook to carry the goods and issued a railway receipt dated 17-1-1963. The consignment reached Bangalore on 10-2-1963, and instead of delivering the said consignment at the destination to the consignee the defendant auctioned the potatoes on 13-2-1963. The plaintiff alleged that the respondent caused abnormal delay in carrying the goods and also failed to disclose as to how the goods were dealt with during the course of transit, hence there is every reason to infer negligence and misconduct on the part of the defendant.

It was also alleged that the auction was done in a hasty manner without giving any valid notice to the plaintiff. The defendant contested the suit on the grounds

that no claim under the Indian Railways Act (hereinafter referred to as the Act) could be preferred by the plaintiff. It was further alleged that there was no negligence or misconduct on the part of the Railway Administration. The disputed consignment was booked at the owner's risk rate and defendant was absolved of all the liabilities. It was also stated that there was no abnormal and inordinate delay in the transit of the consignment and the goods booked were of perishable nature hence the same were auctioned after 24 hours of its (reaching the) destination. The trial court framed necessary issues and thereafter held that the defendant caused undue delay and misconduct and had no right to auction the goods without giving a valid notice to the plaintiff. The trial court also held that as no notice was given, necessary compliance of provisions of law was not made and the defendant was liable to pay the damages. The defendant went up in appeal. The Additional District Judge dismissed the appeal by his judgment and decree dated 15-3-1971. Aggrieved, the defendant has come to this Court in the present second appeal.

3. Sri D. Sanyal, learned counsel for the appellant, has raised three points before this Court: --

1. That as there is neither any pleading nor any evidence about non-disclosure of negligence and misconduct and further as the plaintiff never asked the defendant for disclosing as to how the goods were dealt with during the course of transit, the suit could not be decreed unless an opportunity was afforded to the defendant for such disclosure.

2. That the goods had reached at the destination and there was no one to take delivery of the same, hence the Railway Administration was entitled to sell the goods under Rule 7 (e) of the Rules framed u/s 47 (1) (f) & (g) of the Act, and,

3. That there is no finding by the lower appellate court that the defendant in any way misconducted or was negligent of non-delivery of the goods.

4. The first contention of the learned counsel for the appellant has no force. Section 73 of the Act reads as follows:--

"73. 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) act of God;

(b) act of war;

(c) act of public enemies;

(d) arrest, restraint or seizure under legal process;

(e) orders or restrictions imposed by the Central Government or a State Government or by any Officer or authority subordinate to the Central

Government or a State Government authorised in this behalf;

(f) act or omission or negligence of the consigner or the consignee or the agent or servant of the consignor or the consignee;

(g) natural deterioration or wastage in bulk weight due to inherent defect, quality or vice of the goods;

(h) latent defects;

(i) fire, explosion or any unforeseen risk; provided that even where such loss, destruction, damage, deterioration or non-delivery 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.

Section 74, Sub-clause (3), of the Act which is relevant for the purpose of the present case is also reproduced below:

"74 (1)

(2)

(3) 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"

In the present case it is not in dispute that the goods consigned by the plaintiff were not delivered to it. The defendants considered the goods to be of perishable nature and hence it first sent a telegram to the plaintiff on 12-2-1963 to take delivery of the goods within 15 days, but without waiting for such time, auctioned the same on 13-2-1963. It is also not in dispute that the plaintiff on receiving the telegram immediately communicated to the defendant that he was coming to take the delivery and the goods may not be auctioned. Requirement of Section 74 (3) of the Act is that if the goods are not delivered, the plaintiff can be entitled for the damages of such loss or destruction if it was due to the negligence or misconduct on the part of railway administration or of any of its servants.

5. Now the whole question is whether there was any negligence or misconduct on the part of the railway administration or of any of its servants or not. The trial court while dealing with this question categorically recorded a finding that negligence was caused by the defendant as the goods consigned were not booked and were kept at Juhi station, Kanpur for about 4 days. The trial court, after considering the entire evidence, recorded a specific finding that negligence

and misconduct on behalf of the defendant was established. Learned counsel for the appellant vehemently urged that the plaintiff never asked for such an explanation and as such the defendant were not liable to pay the damages unless the plaintiff asked for the same. He placed reliance on a decision of the Supreme Court in the Union of India (UOI) Vs. Mahadeolal Prabhudayal, .

6. The contention of the learned counsel for the appellant is misconceived, In Union of India v. Mahadeolal. Prabhu Dayal (supra) the Supreme Court has held that if the circumstances show that the risk note would apply, the court would have to decide whether mis-conduct on the part of the railway can be fairly inferred from the evidence produced by it. If the court cannot fairly infer misconduct from the evidence adduced by the railway, the burden will be on the respondent to prove the misconduct. In the present case, misconduct on the part of the railway has been inferred by the courts below on the basis of the evidence adduced by the parties. Hence, applying the principle laid down by Supreme Court, it is established that the defendant was liable to pay the damages. It has further been laid down by the Calcutta High Court in Union of India (UOI) Vs. Ratilal Jadavji, that;

"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".

7. The second contention of the learned counsel for the appellant is wholly misconceived. It is not in dispute that the goods reached the destination on 10-2-1963 and the defendant sent a telegram to the plaintiff on 12-2-1963 asking it to take the delivery within 15 days, but the goods were auctioned on 13-2-1963 under the pretext that the same were of perishable nature. Rule 7 (e) of the Rules framed under the power conferred u/s 47 (1) (f) of the Act is reproduced below:--

"(e) Perishable article unclaimed or not taken delivery of, will be disposed of by auction at owner's risk and expense by that station Master of the station at which they may be left after the expiry of 24 hours or earlier, if they are, or are likely to become, offensive".

This rule does not give power to the railway to auction the goods because neither it is the case of the defendant nor there is any finding or evidence to the effect that the goods were such which were likely to become offensive after expiry of 24 hours. Unless there was a finding or evidence to the effect that the goods were likely to become offensive, the provision of rule 7 (e) would not apply and the defendant had no power to auction the goods. Learned counsel for the appellant placed reliance on a decision of the Kerala High Court in T. B. Muhamed v. Union of India, reported in AIR 1966 Ker 97. This case also clearly lays down

that Rule 7 (e) will apply to the situation as mentioned above. While dealing with the validity of this rule the Kerala High Court itself held that if the goods were not such which were likely to become offensive, the railway could not have dealt with under Rule 7 (e) and the source of power sought to be applied in such situation would be wholly against the rule making power itself. While dealing with this question, the Kerala High Court has held as follows:

"There can be no question, that quite apart from Sections 55 and 56, rules can be framed u/s 47 (1) (f), providing for the terms, and conditions on which goods may be warehoused or retained. Such rule may also provide inter alia, for the warehousing of goods during the period of one month, during which time the notice prescribed by Section 56 (1) may be issued. If in the meantime, goods which are or may be warehoused, have become or are likely to become "offensive", the rules may provide for the disposal of such goods. Offensive goods are not to be detained in the warehouse until the formalities in Sections 55 and 56 are completed, endangering public health or safety. Accordingly, Rule 7 (e) is framed, under which perishable articles, unclaimed or not taken delivery of, are to be disposed of, if they are, or are likely to become, offensive, at any time after the expiry of twenty four hours after they are left at the railway station or even earlier as the situation demands. Rule 7 (e) is in no way touched by the provisions for sale in Section 55 and Section 56, which do not relate to goods which have become or are likely to become offensive".

8. Apart from it, heading of Rule 7 is also very obvious that it applies to the goods which are unclaimed booked goods. In the present case, it is not in dispute that it was within the knowledge of the defendant about the person who booked the goods. Hence also this rule will not apply. The only provision which was applicable was Section 56 of the Act, in case the defendant was claiming that the owner of the goods is not known. In that situation also the goods could be auctioned only after giving the owner reasonable time to remove the goods. The defendant did not wait for the time given in the notice sent through the telegram. This itself shows that the officers were in such a haste that they did not like even to wait for reply of the telegram sent by them. The trial court took into consideration all the relevant circumstances, material facts and the evidence and thereafter held that the defendant caused misconduct and inordinate delay.

9. Learned counsel for the respondent, on the other hand, placed reliance on the decision of the Orissa High Court in *Union of India v. Satyananda Rout*, reported in AIR 1963 Gau 17 wherein it has been held that even if the goods are of perishable nature, the railway has no power to sell the same unless a notice has been given to the consignee, before such sale.

10. In the present case, admittedly, no notice of sale was given to the plaintiff respondent. As no notice was given hence also the sale was wholly illegal which itself was a sufficient circumstance to establish misconduct on the part of the railway administration.

11. As regards the third contention of the learned counsel for the appellant, it has also no force. The trial court under issues Nos. 5 and 6 recorded an elaborate and categorical finding. Before the lower appellate court the questions were only confined to the memo of appeal. No such ground has been raised in the memo of appeal and no such question was urged before the lower appellate court. Apart from it, the judgment of the lower appellate court is a judgment of affirmance and it dealt with all those points which were raised before the court. Apart from affirming the finding of the trial court, the lower appellate court has also dealt in detail with all the facts and questions of law and thereafter came to the conclusion that the plaintiff was entitled for the damages claimed.

12. The result is that this second appeal has no force and as such is here by dismissed with costs. Stay order, if any, shall stand discharged.