

(1953) 03 PAT CK 0002
In the Patna High Court
Case No : A.F.A.D. No. 1179 of 1949

Union of India(UOI)

APPELLANT

Vs

Jetha Bhai Ninshi

RESPONDENT

Date of Decision : 04-03-1953

Acts Referred:

Evidence Act, 1872 — Section 114
Railways Act, 1890 — Section 72

Citation : AIR 1953 Patna 279 : (1953) 1 BLJR 241

Hon'ble Judges : Das, J

Bench : Single Bench

Advocate : P.K. Bese, for the Appellant; S.P. Srivastava, for the Respondent

Final Decision : Allowed

Judgement

Das, J.—This is a second appeal by the defendant and arises out of a suit for recovery of Rs. 1291/3/6 on account of non-delivery of 5 bags of betel-nuts weighing 10 maunds and 5 bags of black pepper weighing 9 maunds 37 seers 8 chataks, plus a small shortage in two bags to the extent of 1 maund 7 seers of black pepper, from a consignment which the plaintiff-respondent had booted from Howrah to Patna Ghat railway station. It is not in dispute that the consignment was booked under risk note forms A and Z. In the former risk note, it was stated that the stitches of the bags were weak and liable to driage, and the contract between the parties was expressed in the following material term:

"I, the undersigned, do hereby agree and undertake to hold the said Railway Administration.... .harmless and free from all responsibility for the condition in which the aforesaid goods may be delivered to the consignee at destination and for any loss arising from the same except upon proof that such loss arose from misconduct on the part of the Railway Administration"s servants."

2. The relevant terms of risk note Z were:

"I, the undersigned, in consideration of such consignments being charged for at

the special reduced or owner's risk rates, do hereby agree and undertake to hold the said Railway Administration harmless and free from all responsibility for any loss, destruction or deterioration, of, or damage to, all or any of such consignments from any cause, whatever, except upon proof that such loss, destruction, deterioration or damage arose from the misconduct on the part of the Railway Administration or its servants; provided that in the following cases:

(a) Non-delivery of the whole of a consignment or of the whole of one or more packages forming part of the consignment packed in accordance with the instructions laid down in the Tariff or, where there are no such instructions, protected otherwise than by paper or other packing readily removable by hand and fully addressed, where such nondelivery is not due to accidents to trains or to fire;

(b) Pilferage from a package or packages forming part of a consignment properly packed as in (a) when such pilferage is pointed out to the servants of the Railway Administration on or before delivery; the Railway Administration shall be bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control and, if necessary, to give evidence thereof before the consignor is called upon to prove misconduct, but, if misconduct on the part of the Railway Administration or its servants cannot be fairly inferred from such evidence, the burden of proving such misconduct shall lie upon the consignor."

3. The consignment in question was booked on 22-12-1945, and was duly loaded in wagon No. 12323 and sealed and riveted for Patna Ghat and despatched from Howrah on 23-12-1945. At all the intermediate stations the seals and rivets were checked and found to be intact. The wagon in question arrived at Patna City on 27-12-1945, and the watchman on duty found that the southern side of the wagon was without seal but the rivets were intact. It was then found that the consignment was 10 bags short, and there, was a small shortage in two bags as well.

4. The learned Munsif who dealt with the suit in the first instance found from the evidence produced before him that the defendant had disclosed how the consignment had been dealt with throughout the time it was in its possession till it reached Patna Ghat station. He further found that the plaintiff-respondent had given no evidence to prove misconduct or neglect on the part of the Railway Administration or its servants. The conclusion at which he arrived was thus expressed by him :

"From the facts and evidence disclosed above, it has been proved that the bags were placed in a wagon which was duly sealed and riveted and nothing more was required to ensure the safety of the consignment which was a through consignment. It was discovered at an intermediate station, that is, at Patna City Railway Station, that the seal had been removed and some of the bags were missing. I hold from the above facts, circumstances and evidence that no

misconduct on the part of the Railway servants could fairly be inferred from the established facts. I also hold that there is a disclosure by the Company of the manner in which the consignment was dealt with while under their control, within the meaning of the contract.....

From all these findings I hold that the black pepper & betel-nuts were subject to running train theft over which the Railway Administration had no control and in the law, circumstances and facts discussed above, I also hold that the defendant is not liable to pay compensation to the plaintiff."

The plaintiff-respondent then filed an appeal. The learned Subordinate Judge who heard the appeal found that the guard of the train which brought the wagon in question to Patna City Railway Station on 27-12-1945, was not examined by the defendant & no explanation was offered as to his non-examination. Relying on the decisions in -- "Surat Cotton Spinning and Weaving Mills Ltd. v. Secy. of State", Am 1937 PC 152 (A) and -- Governor-General in Council Vs. Ramglal Nandlal, , the learned Subordinate Judge drew an adverse inference from the non-examination of the guard and held that misconduct, by complicity in the theft, of some servants of the defendant has been proved. On that finding he gave a decree to the plaintiff-respondent. From that decision of Hue learned Subordinate Judge the defendant has preferred this second appeal.

5. Two points have been urged on behalf of the appellant. It is contended that under the terms of the contract in risk note Z, the appellant was under no obligation to make a disclosure in a case where the packages forming part of the consignment were not, to use the word of the risk note, "packed in accordance with the instructions laid down in the Tariff, or, where there are no such instructions, protected otherwise than by paper or other packing readily removable by hand and fully addressed, etc." It is pointed out that both Clauses (a) and (b) of the proviso embodied in risk note in form Z require that the package or packages forming part of a consignment shall be properly packed, and unless, they are so packed, there is no obligation of disclosure on the part of the Railway Administration.

In support of this contention learned Counsel has relied on certain observations made in the The Governor-General in Council Vs. Kishengopal Bhartia . That was a case in which at the time of delivery it was found that there were cuts in two of the bags and consequently there was a shortage of 3 maunds 30 seers of mustard seed. In that case also, the goods were booked under risk notes A and B, risk note in form B containing the same terms as the risk note in form Z. The observations on which learned Counsel for the appellant relied will be found at page 302 of the report. These observations were :

"In the present case, there is no evidence whatever to, the effect that the packing was in accordance with the instructions laid down in the Tariff and there is no evidence that no such-instructions are laid down in the Tariff. On the other hand, Risk Note "A" was admittedly executed and formed part of the contract

and Risk Note "A" contains an admission that the package was defective. It must be taken as conclusive for the purposes of the present case that the package was not packed in accordance with the instructions laid down in the Tariff, but the burden was on the claimant in the first instance to show either that there are no instructions in the Tariff or that the package was packed in accordance with the instructions laid down in the Tariff, strictly speaking, if the claimant makes no attempt to show that the package was packed in accordance with the instructions laid down in the Tariff or that there were no such instructions, the claimant is not entitled to claim that the provisions of the proviso in Risk Note B are applicable; and further it seems to me that where the claimant has admitted by executing Risk Note A that the package is defective and has omitted to show that in spite of the admitted defects the consignment was packed in accordance with the instructions laid down in the Tariff or to show that no instructions have been laid down, the proviso cannot be applied."

Learned Counsel for the appellant contends that the principle embodied in the observations referred to above applies in the present case inasmuch as, in this case also, the claimant made no attempt to show that the packages were packed in accordance with the instructions laid down in the Tariff, or that there were no such instructions. One point of distinction between the case referred to above and the present case must be noted here. In the Calcutta case there was no non-delivery or shortage of bags; all that happened was that there were cuts in two bags and there was a shortage of 3 maunds 30 seers of mustard seed. The cut in the bags might or might not be due to defective packing; the claimant admitted in that case that there was defective packing, and in those circumstances, it was held that it was for the claimant to show that the packages were packed in accordance with the instructions laid down in the Tariff, or that there were no such instructions. In the case before me, the risk note in form A merely shows that, the stitches in the bags were weak and liable to driage; that defect cannot in any way lead to disappearance of 10 bags, though it can explain the small shortage of 1 maund 7 seers in two bags.

The learned Judge who dealt with the case in -- *The Governor-General in Council Vs. Kishengopal Bhartia* expressed him self somewhat differently in -- "*Governor-General of India in Council v. Dedraj Bajuria* AIR 1948 Cal 168 (D). That was a case in which 22 bags were found damaged at the time of delivery and some of the contents were missing. The consignment was booked under risk notes A and Z. as in the present case; there was a finding of fact in the Courts below that the loss was due to pilferage from packages forming part of the consignment, & the question which was mooted before the High Court was whether the proviso in risk note Z would apply. It was contended that the very fact that risk note A was executed was proof that the consignment was not properly packed. Dealing with that contention Lodge, J. made the following observations:

"There can be no doubt that the consignor is bound by the statement in the Risk Note A as to the condition of the package. But whether the fact that the

consignment was in bad condition means that it was not properly packed in accordance with the instruction laid down in the Tariff I have no means of saying. The Tariff is not before me. There is no evidence on record and I have simply no materials to show whether the fact that the consignment was in a bad condition as indicated in Risk Note A is sufficient to show that the consignment was not properly packed in accordance with the instructions laid down in the Tariff. If the mere execution of Risk Note A is sufficient to show that it was not properly packed, then of course the proviso in Risk Note Z would not apply & the plaintiff would not be entitled to succeed in the suit except on proof that the loss was due to misconduct on the part of the railway administration or its servants. In the present case, there is no such proof. If, therefore, the consignment was not properly packed, the present suit ought to have been dismissed. But as I have stated above I am unable to say from the evidence on record that the consignment was not properly packed in accordance with the instructions laid down in the Tariff as I have no knowledge as to what are the instructions laid down in the Tariff. Therefore, I must assume for the present that the proviso in Risk Note Z does apply. That being so the railway administration was bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control and if necessary to give evidence thereof before the consignor was called upon to prove misconduct."

6. It seems to me that the position is exactly the same in the case before me. The entry in risk note A to the effect that the stitches were weak does not show that the packages were not packed in accordance with the instructions laid down in the Tariff. No evidence was given by either party to show what those instructions were or if there were any instructions at all. Unless the entry in risk note A itself showed that the instructions laid down in the Tariff were not complied with, I am unable to hold that the packages were not packed in accordance with the instructions laid down in the Tariff. I may point out here that if there were no instructions in the Tariff, then the packages were properly packed in the present case; because they were packed in gunny bags and not in paper or other packing readily removable by hand. For these reasons I would overrule the first contention urged on behalf of the appellant.

7. The second point urged on behalf of the appellant is that, in the circumstances of this case, the learned Subordinate Judge was wrong in inferring misconduct on the part of the Railway Administration or its servants from the mere non-examination of the guard who was in charge of the train which brought the wagon to the Patna City station on 27-12-1945. The liability of a railway company under the terms of risk note B. which is similar to risk note Z, was considered by the Privy Council in the well known case of AIR 1937 PC 153 (A)". It was pointed out by their Lordships that the obligation of disclosure arose at once upon the occurrence of either of the two events (a) and (b) referred to in the proviso in the risk note. It was further pointed out that the disclosure was confined to the period during which the consignment was within the possession or control of the Railway Administration. Then their Lordships observed:

"The character of what is requisite may vary according to the circumstances of different cases, but, if the consignor is not satisfied that the disclosure has been adequate, the dispute must be judicially decided. As to the accuracy or truth of the information given, if the consignor is doubtful or unsatisfied, and considers that these should be established by evidence, their Lordships are of opinion that evidence before a Court of law is contemplated, and that, as was properly done in the present suit, the railway administration should submit their evidence first at the trial.

At the close of the evidence for the administration two questions may be said to arise, which it is important to keep distinct. The first question is not a mere question of procedure but is whether they have discharged their obligation of disclosure, and, in regard to this, their Lordships are of opinion that the terms of the Risk note require a step in procedure, which may be said to be unfamiliar in the practice of the Court; if the consignor is not satisfied with the disclosure made, their Lordships are clearly of opinion that it is for him to say so, and to call on the Administration to fulfil their obligation under the contract, and that the Administration should then have the opportunity to meet the demands of the consignor before their case is closed; any question as to whether the consignor's demands go beyond the obligation should be then determined by the Court. If the Administration fails to take the opportunity to satisfy the demands of the consignor so far as endorsed by the Court, they will be in breach of their contractual obligation of disclosure.

The other question which may be said to arise at this stage is whether misconduct may be fairly inferred from the evidence of the Administration : if so the consignor is absolved from his original burden of proof. But, in this case, the decision of the Court may be given when the evidence of both sides has been completed. It is clearly for the Administration to decide for themselves whether they have adduced all the evidence which they consider desirable in avoidance of such fair inference of misconduct. They will doubtless keep in mind the provisions of Section 114, Evidence Act."

Having explained the principle governing the liability of the Railway Administration their Lordships went on to a consideration of the facts of the case and they came to the finding that, in the circumstances of that case, it was the duty of the Railway Administration to give evidence of those of the railway servants who were responsible for the care of the consignment at Buxar and Arrah and during the intervening journey. This decision was considered in -- Governor-General in Council Vs. Thakursi Dass, where the position was thus explained :

"What it comes to is this. The Railway Administration must first make the necessary disclosure, and if the consignor is not satisfied with or is doubtful as to the accuracy or truth of the information disclosed and wants evidence, then the Railway Administration must be the first to submit their evidence at the trial. If the consignor is satisfied that full disclosure has been made, then he must

discharge the onus upon him, and he can do it either by showing that misconduct may be inferred from the evidence led by the Railway Administration, or the disclosures made by them, or he may in his turn affirmatively lead evidence which establishes misconduct. That is one possible course. If, on the other hand, he is not satisfied with the disclosure made, then it is his duty to call upon the Railway Administration for further and better disclosure, or evidence. If he does so, then it will be for the Court to decide whether his demand has or has not gone beyond the obligation which lies upon the Railway Administration under the proviso. If the Court holds that his demand for further proof is not justifiable then of course the Railway Administration need not disclose anything more, and there can be no inference against them from that fact. The plaintiff still has to discharge his burden. But, if the Court holds that the demand is reasonable and in spite of the Court's direction the Railway Administration does not disclose the further particulars called for, then the presumption u/s 114(g), Evidence Act, which says that a presumption may be drawn that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it, will come into operation, and the plaintiff may call upon the Court to draw an inference of misconduct upon the basis of that presumption alone. But, if the Railway Administration has made the further disclosure and no inference can be drawn from the evidence disclosed, then the burden still lies upon the plaintiff, and he has to discharge it before he can succeed. That is the position with regard to risk notes B and Z, and that is the procedure which should be followed by Courts trying such cases."

8. In the case "before me, the finding of the learned Munsif was that the appellant had made a full disclosure of how the consignment was dealt with throughout the time it was in its possession or control, and the non-examination of the guard of the train which brought the wagon to the Patna City Railway Station did not make any difference. The learned Munsif said that the guard of the train had gone to Pakistan. Actually, there was no evidence that the guard had gone to Pakistan, though the questions put to defence witness 6 showed that the guard was not available. It was stated before me by learned counsel for the appellant that by mistake the learned, Munsif did not record the statement of the witness that the guard had gone to Pakistan. It is not possible to accept such a statement bearing on question of fact, unless there is evidence in support of it. The case must be decided on the footing that the appellant failed to examine the guard of the train which brought the wagon to the Patna City station. The appellant did examine witnesses to prove how the consignment was dealt with from Howrah right up to the Barh railway station. After Barh the next station was Patna City. The consignment was a through consignment and the Assistant Station Master of Barh was examined to prove that the wagon in question was intact and the seals and rivets in order when the train left Barh railway station. The watchman of Patna City station and the gunner of Patna City were also examined to prove that on 27-12-1945, when the wagon arrived at Patna City the door of the wagon was found open. The matter was promptly reported to the

guard, head watchman and the number-taker. The wagon was then re-sealed and re-riveted. No complaint was made by the plaintiff-respondent that he was not satisfied with the disclosure made or that he wished to call upon the Railway administration for further and better disclosure. Therefore, the question is whether from the disclosure made by the Railway Administration any misconduct may be fairly inferred. The learned Munsif answered the question in the negative. The learned Subordinate Judge does not say that any misconduct can be fairly inferred from the disclosure made by the appellant; his finding is that misconduct should be inferred not from what the Railway Administration has disclosed but from the presumption which arises out of its failure to examine the guard. In my opinion, the learned Subordinate Judge was wrong in drawing such an inference from the non-examination of the guard in the circumstances of this case. The guard could not say anything more than what the other witnesses of the appellant had said, namely, that the wagon was intact when the train left Barh station and it was found to have been tampered with, when it reached Patna City station.

The inference which was drawn by their Lordships of the Privy Council in -- AIR 1937 152 (Privy Council) arose out of the peculiar circumstances of that case. It was found in that case that the patent locks by which the wagon was secured were opened while the train was standing at Buxar station and it was further found that most of the stolen bales were removed from the wagon while the train was in motion between Buxar and a point probably nearer Baruna than Arrah. It was further found that the thieves must have had information which enabled them to expect and to identify the train and the particular wagon in which the consignment was being carried, and this information would be most easily obtained from the railway servants. In these circumstances, their Lordships held that it was the duty of the Railway Administration to give the evidence of those of the railway servants who were responsible for the care of the consignment at Buxar and Arrah and during the intervening journey.

The other decision on which the learned Subordinate Judge relied is -- Governor-General in Council Vs. Ramglal Nandlal, . There also the Court found that the theft took place at Karamnasa station. There were two Watch and Ward, men on duty at Karamnasa station. These men were not examined. The guard who brought the train to Karamnasa station was also not examined, even though an application was made for his examination. It was held that the evidence and the circumstances afforded an ample basis for the Court below to have come to the conclusion that the theft took place at Karamnasa with the connivance or owing to the misconduct of the railway staff at Karamnasa. I do not think that any of the two decisions relied on by the learned Subordinate Judge support him in the inference which he drew. I do not think that either in law or in fact an inference of misconduct can be fairly made in this case from the non-examination of the guard who brought the train to Patna City railway station, and as to the disclosure made by the appellant it is clear that both Courts have found that no inference of misconduct can be drawn from that disclosure. My view, therefore is

that the learned Subordinate Judge committed an error of law in inferring that misconduct, by complicity in the theft of some servants of the appellant has been proved in this case. The result, therefore, is that the appeal is allowed, the judgment and decree passed by the learned Subordinate Judge are set aside and the suit of the plaintiff-respondent is dismissed. In the peculiar circumstances of this case, I would direct that the parties must bear their own costs throughout.