

(1966) 09 PAT CK 0011
In the Patna High Court
Case No : Civil Revision No. 698 of 1965

Union of India(UOI)

APPELLANT

Vs

Sheo Prasad Fulchand

RESPONDENT

Date of Decision : 29-09-1966

Acts Referred:

Evidence Act, 1872 — Section 106, 114, 57

Railways Act, 1890 — Section 1, 72, 74A, 74C, 74D

Citation : AIR 1967 Patna 328

Hon'ble Judges : G.N. Prasad, J

Bench : Single Bench

Advocate : P.K. Bose, for the Appellant; R.S. Chatterjee, for the Respondent

Final Decision : Partly Allowed

Judgement

G.N. Prasad, J.—This application u/s 25 of the Provincial Small Cause Courts Act has been preferred by the Union of India, which as the owner of the Eastern Railway, the Northern Railway and the Central Railway administrations, was the defendant in a suit instituted by the plaintiff firm for recovery of Rs. 659.14 on account of compensation for loss of a part of a consignment of 14 bales of Indian cotton piece goods booked at Wadibunder on the Central railway for delivery at Jharia on the Eastern railway. At the time of effecting the delivery at Jharia, it was found that three of the bales had been damaged by rain water and from a fourth bale, the contents had been partly removed. The remaining ten bales were intact. Accordingly, the plaintiff took open delivery after assessment of the damage.

2. The case of the plaintiff was that the short delivery and the damage was due to negligence and misconduct on the part of the servants of the railway administrations concerned and, accordingly, the present suit was instituted after service of the requisite notices upon the railway administrations concerned. The total claim of Rs. 659.14 was made up of Rs. 505.14 on account of loss by damage due to wet and Rs. 154.00 as loss suffered on account of tampering with

the fourth bale, the contents of which had been partly removed.

3. The defendant denied its liability, principally, on the ground that the consignment tendered for despatch was in a defective condition, inasmuch as the packing conditions laid down in the Tariff Rules had not been complied with by the consignor and a note to that effect had been made by the sender on the forwarding note (Ext. B) As to the shortage in the fourth bale, the defendant's case was that it was not due to any tampering in transit, but due to short packing by the sender. The defendant denied that there was any negligence, misconduct or carelessness on the part of the railway servants.

4. The learned Small Cause Court Judge has come to the conclusion that the packing conditions laid down in the Tariff Rules had been substantially complied with and this plea was, therefore, not available to the defendant. The learned Judge has held that the railway administrations had failed to prove the manner in which the consignment was dealt with between the despatching station and the destination station and thereby to discharge the onus heavily lying upon them, and so the plaintiff's allegation about damage by rain water being due to negligence, misconduct and carelessness of the railway administrations was correct. As to the short delivery of one of the bales, the learned Judge has held that it was the result of tampering by the servants of the railway administrations, and for that also, the railway administrations was liable. The suit having been decreed in full, the defendant has come up to this court in revision.

5. The principal contention of Mr. P.K. Bose appearing for the Union of India is that the learned Judge has wrongly thrown the burden of proof upon the defendant. According to the learned counsel, it was for the plaintiff to prove negligence or misconduct on the part of the railway administrations or its servants, and the defendant was not bound to lead evidence or to disclose how the consignment was dealt with in the transit. The learned counsel relied upon the provisions of Sections 74A and 74C of the Railways Act as they stood at the relevant time, whereby the general responsibility of the railway administration laid down in Section 72 of the Act was limited in certain respects Learned counsel conceded that if Section 72 applied, then the decree passed by the learned Small Cause Court Judge was correct. But this case is governed by the provisions of Section 74A of the Act, inasmuch as the consignment which was tendered to the railway administration for transit was not packed in accordance with the Tariff Rules, and due to such defective packing, it was liable to leakage, wastage or damage in transit. Learned counsel relied upon the forwarding note (Ext. B), wherein the sender had made an endorsement to the effect that no tarpaulin had been used in the outer covering, although water proof covering had been used inside. Learned counsel referred to paragraph I) of the written statement wherein the defendant averred as follows:

"This defendant states that the consignment when tendered for despatch was in defective condition inasmuch as packing condition as per Rly rules were not complied with. That a remark to that effect was made by the sender in F. Note."

This, according to the learned counsel, was recorded by the sender in the forwarding note (Ext. B), as required by Sub-section (1) of Section 74A of the Act. That section provides that when any goods tendered to a railway administration for carriage by railway are either defectively packed or packed in a manner not in accordance with the prescribed rules, and, as a result of such defective or improper packing, are liable to leakage, wastage or damage in transit, and the fact of such defective or improper packing has been recorded by the sender or his agent in the forwarding note, then the railway administration shall not be responsible for any deterioration, leakage, wastage or damage, etc., except upon proof of negligence or misconduct on the part of the railway administration or of any of its servants.

6. There can be no doubt that if Section 74A of the Railways Act is applicable, then the plaintiff cannot rely upon the general responsibility of the railway administration u/s 72 of the Act; but must prove that the loss or damage was due to negligence or misconduct on the part of the railway administration or of any of its servants. The learned Small Cause Court Judge has held that the packing conditions were substantially complied with on the basis of the evidence of the plaintiff's witness Bhagwan Sahai (P. W. 1), who deposed that the materials used in the packing were alkathene water proof packing paper and a thin Chatai over which there was Khajur chatai and a thick Chhati plastered with coaltar.

These materials, according to the Chamber's dictionary fulfilled the definition of tarpaulin: but in face of the endorsement made by the sender in the forwarding note (Ext. B) referred to above, it was not open to the plaintiff to adduce evidence which P. W. 1 has given. This is quite clear from a decision of Meredith, J in Governor-General in Council Vs. Thakursi Dass, , where a consignor had executed risk notes A and Z, then in vague, limiting the general responsibility of the railway administration u/s 72 of the Act. Risk note A was a special form of risk note to be used when goods were tendered for carriage which were either in bad condition or so defectively packed as to be liable to damage, leakage or wastage in transit. Risk note 2 was a special form to be used when the sender elected to despatch the goods at a special reduced or owner's risk rate, and in view of the reduced rate charged, the railway administration was exempted from responsibility for loss or damage except under certain conditions.

The execution of the notes was discontinued when Sections 74A to 74E were inserted in the Railways Act by Act 66 of 1949 which came into force on the 1st August, 1950. Generally speaking, the provisions of Section 74A replaced the conditions of risk note A, and likewise the provisions of Section 74C gave statutory recognition to the conditions prescribed in risk note Z, which was more or less similar to risk note B. In the case before Meredith, J. referred to above, the consignor had executed risk note A. Meredith, J. held: "The plaintiff chose to execute this Risk Note A, and having done so it was not open to him at the trial to claim that the packing was perfect and the learned Munsif was not entitled to

hold upon the basis of a statement made by one of the defendant's witnesses that the packing was fully in order see *Mafat Lal Gogal Bhai Vs. B.B. and C.I. Ry. Co. Ltd. and Another*, with which I agree. In short, if the consignment was properly packed, then why did the consignor execute this risk note? If he did so, he must be prepared for limitation of the Railway Administration's liability to the extent which that risk note involves."

7. The views thus expressed by Meredith J. were approved by a Bench of this Court in Second Appeal No. 2153 of 1948 decided on 20-7-1954 (Pat). There Das, J. (as he then was), with whom Banerji J. agreed, referred with approval to the observation of Meredith, J. just referred to. and held:

"In view of the execution of Risk Note A, it was not open to the learned Munsif in this case to hold that the tins were properly packed and were in good order. It was open to the railway administration to take advantage of the contract in Risk Note A; that contract does not make it obligatory on the railway administration to make any disclosure and throws the onus on the consignor to prove misconduct."

His Lordship then referred to the relevant terms of Risk Note A. and observed:

"In view of the said term in Risk Note A, it was clearly for the appellant to prove misconduct on the part of the servants of the railway administration and no inference could be drawn from any non-disclosure of how the consignment had been dealt with by the railway administration."

In the instant case also, the sender had recorded on the forwarding note (Ext. B) that no tarpaulin had been used in the outer packing, meaning thereby that the consignment had not been packed in accordance with the relevant Tariff Rules. The relevant packing rule is Rule P/25A (i) of Chapter IX. Section 1, of the Tariff Rules, under which the outer covering must be a layer of tarpaulin during the monsoon months, and the present consignment was booked during the monsoon season, of which the Court is entitled to take judicial notice, as was done by a Bench of this Court in Civil Revn. Nos. 483 and 945 of 1962 (Pat) disposed of by Choudhary and Tarkeshwar Nath JJ on 25-8-1966.

The sender having recorded on the forwarding note (Ex. B) that no tarpaulin had been used in the outer covering, it was not open to the plaintiff to resile from that position and to lead evidence at the trial to the effect that the prescribed packing conditions had been substantially complied with. Upon the authorities referred to above, I must, therefore, hold that the learned Judge was in error in holding that the packing conditions were substantially complied with. It follows that the provisions of Section 74A of the Railways Act were attracted and that in order to succeed in the claim for damage caused to three of the bales by rain water, the plaintiff must prove negligence or misconduct on the part of the railway administration or its servants.

8. Mr. R.S. Chatterjee appearing on behalf of the plaintiff contended that even so, the onus lay upon the defendant to make a full disclosure as to how the

consignment was dealt with from the stage of the booking to the stage of the delivery because that was a matter within the special knowledge of the defendant within the meaning of Section 106 of the Evidence Act, and since that was not done, an adverse presumption must be drawn against the defendant under Clause (g) of Section 114 of the Evidence Act. In support of his contention Mr. Chatterjee relied upon a Bench decision of the Punjab High Court in the Union of India v Delhi Cloth and General Mills Co. Ltd AIR 1964 P&h 147. There it was held that in a suit brought against the railway administration for damages to goods booked at owner's risk, the burden of proving misconduct or negligence is on the plaintiff. But having regard to the provisions of Section 72 of the Railways Act, the railway administration is supposed to take that much care of the goods as a man of ordinary prudence would take in respect of his own goods.

It was further held that since the facts as to how the damage or loss had occurred to the goods are within the special knowledge of the railway administration, under the provisions of Section 106 of the Evidence Act, the railway administration is supposed to adduce evidence to show how the goods were dealt with in course of the transit and that they had taken as much care as a man of ordinary prudence would do regarding his own goods. In case the railway administration does not produce such evidence, an adverse presumption would be drawn against them u/s 114(g) of the Evidence Act. The report, however, shows that in that case the plaintiff had made a number of applications under Rules 12 and 18 of Order XI and Rule 8 of Order XII of the CPC for the discovery, inspection and production of certain documents, but they were not produced by the defendant. The observations of their Lordships must be read in the background of this circumstance. In the present case, the plaintiff did not call upon the railway administration for the production of any material which was in their possession and therefore, there can be no scope for drawing any adverse presumption, as suggested by Mr. Chatterjee.

9. Mr. Chatterjee also relied upon *Ramkrina Ramnath Shop Vs. Union of India and Others*, where Section 74C was held to apply and it was observed that although in cases to which Section 74C is applicable, the burden of proving misconduct or negligence is on the plaintiff, yet u/s 106 of the Evidence Act, the railway administration should call all the material witnesses to prove the facts which were within their special knowledge. The facts of that case also are distinguishable from those of the present case. There the defendant had undertaken to produce the Inspector of wagons in Court and had also taken two previous adjournments for the purpose. It was, therefore, held that the failure to examine the witness in question was due to the default of the railway administration.

Besides, the views expressed by their Lordships in the Bombay case have not been followed in this Court. In Civil Revn. No. 794 of 1964 (Pat) disposed of by me on 14-9-1966, I pointed out that the view taken in the Bombay case is not consistent with the views uniformly prevailing in this Court and that it is not

possible to follow the Bombay decision in preference to a series of decisions of this Court, to which I referred in that case. The legal position was explained by Meredith J. in *Governor-General in Council Vs. Thakursi Dass*, , already referred to, in the following terms:

"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 disclosure 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 it is the position with regard to risk notes B and Z. and that is procedure which should be followed by Courts trying such cases.""

10. In the present case also, as in the case before Meredith, J. the plaintiff never called for any disclosure from the railway administration. As such no duty was cast upon the defendant to disclose anything and where there is no duty to disclose, there can be no penalty for non-disclosure. Consequently, there is no scope for drawing any adverse inference against the defendant u/s 114(g) of the Evidence Act. The same conclusion follows from the decision of Das, J. in Second Appeal No. 2153 of 1948 (Pat) decided by a Bench of this Court on 20-7-1954 in *Union of India v. Bishwanath Agarwalla* AIR 1959 Pat 478. U. N. Sinha, J. observed:

"When the Statute requires proof of negligence, misconduct etc., for the liability for the loss, destruction, deterioration, leakage etc., to hold that the loss or

damage is prima facie proof of negligence is to make the entire effect of Sections 74A and 74C nugatory. Here lies the importance of the qualifying words "subject to the other provisions of this Act" occurring in Section 72 of the Indian Railways Act."

In that case also, the consignment was not packed in accordance with the Tariff Rules contemplated by Section 74A of the Act, and the consignment was on transit for nine days. His Lordship held that under these circumstances, it was necessary for the plaintiff to put materials before the Court to prove negligence or misconduct on the part of the Railway administration or any of its servants. Following the decisions of this Court referred to above, I must hold that no duty lay upon the railway administration to show how the consignment was dealt with during the transit. The learned Judge was therefore, in error in holding that the railway administration has failed to discharge the onus heavily lying upon them and that the plaintiff had succeeded in proving that three of the bales were damaged by rain water due to negligence, misconduct and carelessness of the railway servants. In my opinion, the plaintiff is not entitled to any decree in respect of the damage to the three bales by rain water.

11. In regard to the second part of the plaintiffs claim also Mr. P.K. Bose sought to rely upon the provisions of Section 74A of the Railways Act. Here I think that Mr. Bose is not right. Section 74A deals with the liability of the railway administration where the goods tendered for carriage are liable to leakage, wastage or damage in transit due to defective condition or defective packing. In other words, the loss or damage must have relation to the defective condition or the defective packing of the consignment, as was the case with three of the bales which were damaged by rain water on that account. But the shortage of the contents of the fourth bale could not reasonably be attributed to the defective packing of the consignment or to failure to pack it in accordance with the Tariff Rules.

The learned Judge has pointed out that from the endorsement made on the forwarding note (Ext. B), it appears that the bales were press packed and bound with iron bands and since the fourth bale was found loose at the destination station, it was a case of tampering with the bale in transit. It is true that the plaintiff did not specifically plead in its plaint that the consignment had been booked at the railway risk rate, I must, therefore, proceed upon the footing that it was booked at the special reduced or the owner & risk rate, as provided in Section 74C of the Railways Act. Sub-section (3) of Section 74C provides:

"When any animals or goods are carried or are deemed to be carried at owner's risk rate a railway administration shall not be responsible for any loss destruction or deterioration of or damage to such goods from any cause whatsoever except upon proof that such loss, destruction, deterioration or damage was due to negligence or misconduct on the part of the railway administration or of any of its servants."

But there is an exception to this provision which is to be found in Section 74D of the Act. That section provides that in respect of any consignment of goods or of any package which had been so covered or protected that the covering or protection was not readily removable by hand. If it is pointed out to the railway administration on or before delivery that any part of such consignment or package had been pilfered in transit, then notwithstanding the provisions of Section 74C of the Act the railway administration shall be bound to disclose to the consignor how the consignment or package was dealt with throughout the time it was in its possession or control, but if negligence or misconduct on the part of the railway administration or of any of its servants cannot be fairly inferred from such disclosure, the burden of proving such negligence or misconduct shall lie on the consignor."

In respect of the fourth bale, therefore, the railway administration was bound to disclose how the consignment was dealt with while it was in its possession or control, and since that was not done, no further duty lay upon the plaintiff to prove negligence or misconduct in respect of that consignment. It will be observed that the defendant set up a plea that there was no sign of pilferage in the fourth bale and there was no shortage at all; but if there was any shortage, it was due to short packing by the sender. This plea of the defendant has failed and, therefore, the learned Judge has rightly held the railway administration responsible for the loss of a part of the contents of the fourth bale.

12. In the result, this application succeeds in part. The plaintiffs' claim to the extent of Rs. 505.14 fails, but the claim with respect to the balance of Rs. 164.00 succeeds. The decree passed by the learned Small Cause Court Judge is modified to this extent. In the circumstances of this case, there would be no order as to costs in either Court.