
(1965) 05 RAJ CK 0008
In the Rajasthan High Court
Case No : Second Appeal No. 30 of 1958

Vidya Ratan

APPELLANT

Vs

Kota Transport Co. Ltd.

RESPONDENT

Date of Decision : 03-05-1965

Acts Referred:

Carriers Act, 1865 — Section 5, 6, 8, 9
Kotah State Civil Courts Act, 1945 — Section 21

Citation : AIR 1965 Raj 200 : (1965) RLW 247

Hon'ble Judges : D.S. Dave, C.J; Kan Singh, J

Bench : Division Bench

Advocate : B.S. Sharma, for the Appellant; Sagarmal Mehta, for the Respondent

Judgement

Kan Singh, J.—This second appeal before us raises a question about the liability of a common carrier in respect of the loss of goods in transit delivered to him for transport.

2. The appellant before us is the legal representative of one Mangilal Chopra of Mangrol who had commenced the action for the recovery of an amount of Rs. 1134/6/6 from Kota Transport Company Limited for non-delivery of 24 maunds and 11 seers of cotton which was consigned from Kota to Mangrol by a truck run under the management and control of the defendant company. It is common ground between the parties that the defendant company had a monopoly to ply transport vehicles within the ex-Kota State in the year 1949, and was acting as common carrier of goods. It was averred that on 5-12-1949, Messrs. Madhay Das Hiralal of Kota, who were plaintiff's agents, delivered 27 maunds 11 seers and 4 chhataks of cotton valued at Rs. 1266/6/6 to the defendant company for being carried to Mangrol. This cotton was carried in a gas plant truck No. 564. Unfortunately, when the loaded truck had come near river Barod on the way it was found to have caught fire and the load was gutted. However, only 3 maunds of the cargo could be salvaged and delivered to the plaintiff. Accordingly the plaintiff demanded the value of the undelivered cotton from the defendant

company, but as it did not care for the demand, the plaintiff filed the suit in the court of the Munsif, Kota.

The defendant admitted the fact regarding the carriage of cotton from Kota to Mangrol by truck No. 564. It was also admitted that only 3 maunds of cotton could be delivered, but it was pleaded that the loss was caused on account of the goods catching fire and it was asserted that the defendant company was not at all liable for the same. A special plea was raised to the effect that one Dhanna Lal, who had approached the defendant company for transporting these goods, was warned by the employees of the defendant company that it was risky to take cotton in a gas plant truck, but as Dhanna Lal agreed that the goods be taken on his own risk and responsibility, the defendant company agreed to carry the goods. The learned Munsif framed the following six issues :--

(1) Did plaintiff's agent Messrs. Madhav Das Heera Lal entrust 27 maunds 11 seers 4 chhataks of cotton on 5-12-1949 to the defendant on behalf of plaintiff?

(2) Was said cotton valued at Rs. 1268/8/6?

(3) Was defendant liable to transport and deliver cotton to the plaintiff at Mangrol and defendant was responsible for the risk in the way?

(4) Did plaintiff receive only 3 maunds of cotton and did not receive the rest of the said cotton and plaintiff can get Rs. 1134/6/6 as price of the same from the defendant?

(5) Was cotton really burnt in the way and what is its effect on the suit?

(6) To what relief parties are entitled?

3. The suit was decreed by the learned Munsif, but an appeal was taken against that decision to the District Judge, Kota, who remanded the case after framing two additional issues and directed the Munsif to decide the case afresh. The additional issues were as follows :--

(1) Whether Dhanna Lal had absolved defendant from all liability during the transport?

(2) Whether plaintiff is bound by the contract of Dhanna Lal entered into with the defendant?

4. The learned Munsif again decided all the issues in favour of the plaintiff. As regards the additional issues, the learned Munsif came to the conclusion that Dhanna Lal had done nothing towards absolving the defendant company from liability. He also came to the conclusion that it had not been established that Dhanna Lal had acted as an agent of the plaintiff and consequently the learned Munsif held that Dhanna Lal had no authority to bind the plaintiff in this behalf. In the result the learned Munsif passed a decree for a sum of Rs. 1134/6/6 against the defendant company. The defendant then went up in appeal to the District Judge, Kota. Before the learned District Judge the following 3 points were

raised on behalf of the defendant.

(1) There was no privity of contract between the plaintiff and the defendant's company and as such the latter could not be sued by the plaintiff.

(2) There was no negligence of the defendant.

(3) The Common Carriers Act having come into force in Rajasthan on 29-1-50, the Act or its principles cannot be extended to cover the accident which had occurred on the night of 5th December, 1949, and that the defendant was at best a bailee under the Contract Act and was not liable for the damage in the absence of any specific contract and negligence on its part.

5. In considering the first question the learned District Judge disbelieved the plaintiff's evidence and by believing the evidence of the defendant he came to the conclusion that cotton was taken by Dhanna Lal on his own responsibility in the gas plant truck. The learned District Judge then applied himself to the consideration of the question whether Dhanna Lal could take the responsibility on his own head on behalf of the plaintiff and thus exonerate the defendant of all liabilities under the law.

The learned District Judge observed in this behalf that there was nothing to show on the record that Dhanna Lal had disclosed to the defendant that the cotton was of the plaintiff or that he had no authority on behalf of the plaintiff to give such an undertaking. According to him, it was usual for businessmen to take risks in such matters and, therefore! it was likely that Dhanna Lal shouldered this responsibility. In the light of these observations the learned Judge reached the conclusion that there was no privity of contract between the plaintiff and the defendant company and consequently the plaintiff could not sue the defendant for damages. We may reproduce the observations of the learned District Judge, as, to our mind, they betray confusion of thought. The learned Judge observed thus :

"There is nothing on record to show that Dhanna Lal had disclosed to the defendant that the cotton was of the plaintiff or that he had no authority on behalf of the plaintiff to give such an undertaking. Probably it was in good faith on both the sides initially that such an undertaking of taking cotton on Dhanna Lal's responsibility was given and taken. The difficulty arose only when the incident occurred. Indian business people by temperament as well as in view of nature and exigencies of their business are prone and accustomed to take such risks. No wonder, therefore, Dhanna Lal shouldered this responsibility. But since both the plaintiff and Dhanna Lal have denied that Dhanna Lal had any authority on behalf of the plaintiff to take such a responsibility and that Dhanna Lal was the plaintiff's agent. It seems that the legal position was that there was no privity of contract between the plaintiff and the defendant's company, and the plaintiff could not sue the defendant for damages,"

We propose to deal with these observations at appropriate place.

6. As regards the point No. 2, the learned District Judge came to the conclusion that there was no negligence on the part of the defendant's driver and it was by chance that the goods caught fire and consequently the defendant company could not be held responsible for the same.

7. As regards the third point, the learned District Judge held that while it was true that the Carriers Act was not in force in the ex-Kota State on the day of the incident, the principles of the English Common Law on which the Carriers Act was based could be applied on considerations of justice, equity and good conscience. Thus, in the opinion of the learned District judge, the defendant was a common carrier and was bound to transport the goods entrusted to it safely. He also held that the liability of common carrier was absolute. But, as in the present case, according to him, the liability was circumscribed by a mutual contract between Dhanna Lal, on the one hand, and the defendant, on the other, the defendant could not be held responsible for the plaintiff's loss. In the result the learned District Judge set aside the decree awarded by the Munsif, Kota, and dismissed the suit.

8. We may observe that, while under the first point the learned District Judge has reached the conclusion that there was no privity of contract between the plaintiff and the defendant, under the third point the learned District Judge has held that the defendant was a common carrier, though in the present case its liability was limited by a special contract made by one Dhanna Lal. The learned District Judge does not appear to have properly appreciated the position of a common carrier.

In the case of a common carrier there need not be any privity of contract between the consignee of the goods and the carrier. A consignee, who is the owner of the goods, can certainly sue the common carrier for non-delivery.

9. Before we deal with the matter further it will be appropriate to consider the question as to how far the principles governing the liability of a common carrier as contained in the Carriers Act, 1865, could be invoked in the present case, as at the time the incident happened Carriers Act had not been extended to Rajasthan. Rajasthan was formed on 7-4-1949, and the goods were consigned from Kota on 5-12-1949, as already observed and a major portion of the consignment was burnt on the way to Mangrol on the night of 5-12-1949. The laws of various covenanting states which constituted Rajasthan were continued by the Rajasthan Administration Ordinance No. 1 of 1949. In the circumstances we have to ascertain as to what was the law of the ex-Kota State in the matter of common carriers.

10. There was Kota State Laws Act No. 1 of 1948, Section 3 of which empowered the State Government to apply or extend with such restrictions and modifications, as it thought fit, to the Kota State or any part thereof, any laws which were in force in India at the date of such notification. Section 4 of that Act enjoined on the courts to construe the laws of India *mutatis mutandis* in dealing with a matter before the Court. Then, there was the Kota State Civil Courts Act,

Section 21 whereof ran as under :

"(1) Where in any suit or other proceeding it is necessary for a Civil Court to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution, the Mohammadan Law in cases where the parties are Mohammedans, and the Hindu Law in cases where the parties are Hindus, shall form the rule of decision, except in so far as such law has, by legislative enactment or by custom having the force of law and governing the property or parties concerned, been altered or abolished.

(2) In cases not provided for by Sub-section (1) or by any other law for the time being in force, the court shall act according to justice, equity and good conscience."

The first sub-section deals with personal laws and the second sub-section applies generally to all other suits or proceedings which are not governed by personal laws or by any other law for the time being in force. Thus it was not only permissible) but made incumbent on courts that, where a particular matter was not governed by any law, they were to act according to justice, equity and good conscience. In *Kota Transport Ltd., Kota v. Jhalawar Transport Service Ltd., Jhalawar*, ILR (1960) 10 Raj 705: A I R 1980 Raj 224, this Court had occasion to consider whether the Law of Torts as was in force in former British India could govern cases coming up before Kota courts and in particular the question arose whether the provisions of the Fatal Accidents Act (No. XIII of 1855) could be taken to be applicable in Kota so that the heir of a deceased could be held entitled to sue in respect of a tort resulting in the death of the deceased. In considering the implications of Section 21 of the Kota State Civil Courts Act, extracted above, the learned Judges observed as follows :

"The first Sub-section of Section 21 of the Kota State Civil Courts Act deals with questions governed by personal laws, and the second Sub-section applies generally to all other suits or proceedings which are not governed by personal laws or by any other law for the time being in force. The two Sub-sections taken together exhaust the whole range of suits. It, therefore, follows that a suit for damages for tortious action would fall under the second Sub-section of Section 21.

The Indian courts, when applying the rules of justice, equity and good conscience would be justified in applying the law of torts as it stood at the relevant time and not go back to the pre-natal period, when Lord Ellenborough held that under the Common Law of England, no one could recover damages in tort for the death of another. It would be illogical for the courts in applying the principles of justice, equity and good conscience to treat the Common Law on the subject, divorced from the statute law, when the established law at the relevant date, prevailing on the subject, whether in India or in England was the law as modified by statute."

Thus, we are left in no doubt that the principles underlying Carriers Act, 1865, which was in force in former British India could be resorted to in dealing with the

liability of common carriers in the ex-Kota "State on grounds of justice, equity and good conscience.

11. As we have already observed, the admitted position between the parties was that the defendants were common carriers. The preamble of the Act, amongst other things, recites that it was in order to enable common carriers to limit their liability for loss or damage to property delivered to them to be carried that the Act was passed. The preamble thus suggests that prior to the enforcement of this Act, even in British India, there were already extant certain principles of common law about the liability of common carriers under the common law. It seems that the liability of a common carrier under the Common Law was in some respects larger than what was contained in the Carriers Act. A common carrier is responsible for the safety of the goods entrusted to him in all events, except when loss or injury arises solely from act of God or the Queen's enemies or from the fault of the consignor or inherent vice in the goods themselves. He was held liable even when the carrier was overwhelmed and robbed by irresistible number of persons (vide Article 382 in Halsbury's Laws of England, Third Edn., Vol. 4, at Page 141). A common carrier was held an insurer of safety of the goods against everything extraneous which may cause loss or injury except the act of God or the Queen's enemies. As in the Indian Carriers Act, so in the corresponding English Carriers Act, the liability of the common carriers could be limited by special contract. Under the head "Variation of Common Law Duties and Liabilities" and under the Sub-head "Construction of special contracts" in the volume, already referred to, in the Halsbury's Laws of England the following passage occurs : --

"407. Construction of special contracts.--The liability of a common carrier for loss, injury or delay in respect to the goods carried may be varied by contract. If the contract is such as to obliterate or destroy his character of a common carrier, he must be regarded for the purposes of that particular contract as a private carrier, but if the contract does not so obliterate or destroy that character, and merely limits his liabilities in some respects, in all other respects he remains under a common carrier's liability.

Such a contract may be express or implied from conduct, but whether it is to be implied or not is a question of fact. Exemptions by special contract to the general liability of a carrier are to be construed strictly, and are not created by the use of subtle implications or ambiguous words. In some cases such a contract must be in writing and signed by the consignor".

Section 2 of the Carriers Act, 1885, defines a common carrier as a person, other than the Government, engaged in the business of transporting for hire property from place to place, by land or inland navigation, for all persons indiscriminately. Section 8 deals with the question of limiting the liability of any common carrier and runs as follows :

"Section 6. In respect of what property liability of carrier not limited or affected

by public notice.

The liability of any common carrier for the loss of or damage to any property delivered to him to be carried, not being of the description contained in the schedule to this Act, shall not be deemed to be limited or affected by any public notice ;

Carriers, with certain exceptions, may limit liability by special contract) but any such carrier, not being the owner of a railroad or tramroad constructed under the provisions of Act XXII of 1863 (to provide for taking land for works of public utility to be constructed by private persons or companies, and for regulating the construction and use of works on land so taken) may, by special contract, signed by the owner of such property so delivered as last aforesaid or by some person duly authorized in that behalf by such owner, limit his liability in respect of the same"

12. Section 9 provides that "In any suit brought against a common carrier for the loss, damage or nondelivery of goods entrusted to him for carriage, it shall not be necessary for the plaintiff to prove that such loss, damage or non-delivery was owing to the negligence or criminal act of the carrier, his servants, or agents."

13. The arguments before us principally centered round the question of limiting the liability of a common carrier. It was submitted on behalf of the defendant respondent that it was a finding of fact arrived at by the Court below that the defendant and one Dhanna Lal had entered into a mutual contract by which the defendant was absolved of all liability in the matter of transporting cotton in a gas plant truck. It was contended that as the requirement of a written contract was nothing but a technical provision, it was sufficient even if the contract without any writing was entered into. According to the learned counsel that conforms sufficiently to the requirements of Section 6 of the Carriers Act, bereft of its technical provision about the special contract being in writing,

14. We have considered the matter with a view to seeing what provision of Section 8 of the Carriers Act could be regarded to contain a principle of justice, equity and good conscience and what provision therein could be regarded merely a technical one. It cannot be overlooked that without there being any enabling provision to limit the liability of a common carrier, its liability to deliver the goods will be absolute and it could be excused from such delivery only, if the loss is caused by an act of God or an act of the enemies of the realm. As will be found from the passage from Halsbury's Laws of England, quoted above, exemptions by special contract to the general liability of a carrier are to be construed strictly, and are not created by the use of subtle implications or ambiguous words. The learned District Judge has only dealt with this aspect of the matter in a most perfunctory manner. He has not taken into consideration the provisions of Section 6 of the Carriers Act at all. Besides the contract being in writing, it has to be by the owner of the goods or by a person authorised by him in this behalf.

Assuming that the requirement about the contract being in writing is a technical provision, it has still to be shown that the contract was made by the owner of the goods or by a person who was authorised by him.

The question, therefore, immediately arises whether Dhanna Lal was the owner of the goods or a person authorised by the owner to enter into a contract as would relieve the carrier of its liability. We have looked to the pleadings. The defendant has averred that Dhanna Lal who claimed to be the owner approached him for the carriage of the cotton and agreed to absolve him of all liability. Regarding the carriage of the goods, it does not transpire from the averment that Dhanna Lal was either the owner of the goods or he had been authorised by the owner to free the defendant from its responsibility arising in the matter as a common carrier. At the risk of repetition we may pin-point the following observations in the judgment of the learned District Judge :

"There is nothing on record to show that Dhanna Lal had disclosed to the defendant that the cotton was of the plaintiff or that he had no authority on behalf of the plaintiff to give such an undertaking, Probably it was in good faith on both the sides initially that such an undertaking of taking cotton on Dhanna Lal's responsibility was given and taken. The difficulty arose only when the incident occurred. Indian business people by temperament as well as in view of nature and exigencies of their business are prone and accustomed to take such risks. No wonder, therefore, Dhanna Lal shouldered this responsibility. But since both the plaintiff and Dhanna Lal have denied that Dhanna Lal had any authority on behalf of the plaintiff to take such a responsibility and that Dhanna Lal was the plaintiff's agent."

Thus, the learned Judge has not considered at all that the special contract was sufficient in law to relieve the carriers of their responsibility, even if it was not in writing. As observed by us, it is a principle of justice, equity and good conscience that the liability of the common carrier could be limited only by the owner of the goods or a person duly authorised by him in this behalf. Far from considering what the requirements of a contract as would relieve a common carrier were, the learned Judge reached the conclusion, under his first point, that there was no privity of contract between the plaintiff and the defendant, and consequently, the plaintiff could not sue the defendant for damages. This shows that the learned District Judge has gone off the track and has reached a wholly faulty conclusion. We do not find any material for coming to the conclusion that a proper contract as would relieve the common carrier of its liability in law has been established.

15. It was observed by their Lordships of the Privy Council in *Irrawaddi Flotilla Co. v. Bugwan-das*, ILR 18 Cal 620 (PC), that the liability of a common carrier is not founded upon contract, but on the exercise of public employment for reward. The duty arises irrespective of contract, and the owner of the goods may, therefore, sue the common carrier for breach of the common law duty in an action of tort.

16. In *India General Navigation and Rly. Co. Ltd. v. Dekhari Tea Co. Ltd.*, AIR 1924 P C 40, in construing the provisions of Section 2 of the Carriers Act their Lordships of the Privy Council observed that a common carrier was not at liberty to refuse business and his duty arose from public employment in which it was engaged. Apart from danger arising, say, from the nature of the goods received, their Lordships of the Privy Council observed, the carrier is by his office bound to transport the goods as clearly as if there had been a special contract which purported so to bind him and he is answerable to the owner for safe and sound delivery.

17. In *Sukul Bros. v. H. K. Kavarana*, AIR 1958 Cal 730, it was observed :

"The duties and obligations of a common carrier are governed by the English common Law as modified by the provisions of the Indian Carriers Act. By the common law a common carrier is bound to deliver the goods within a reasonable time and to insure their safety during their carriage and until delivery, act of God and the King's enemies only excepted. The obligation is not founded upon contract, but on the exercise of public employment for reward. The duty arises irrespective of the contract. The owner of the goods may sue the common carrier for breach of the common law duty in an action of tort."

In coming to this conclusion the learned Judges relied on *Irrawaddi Flotilla Company's case*, ILR 18 Cal 620 (PC).

18. In *River Steam Navigation Co. Ltd. v. Syam Sunder Tea Co. Ltd.*, AIR 1955 Ass 65, it was observed by the learned Judges that once the carrier has accepted the goods and they were lost in his custody, he is bound to make good the loss. It was recognised that while a common carrier can limit his liability by special contract signed by the owner of the property or by some duly authorised person in that behalf, the contract being in derogation of common law has to be strictly proved. The relevant observations may be quoted hereunder :

""It may happen at times that although a common carrier may accept delivery of the goods and yet may have failed to book them or to give receipt for the same before they are lost in his custody. In such a case, the mere fact that the goods were not booked or that a regular receipt had not been granted, will not make any difference to the liability of the common carrier, provided the goods are proved to have been lost while in his custody."

"It is no doubt open to a common carrier u/s 6 to limit his liability by special contract signed by the owner of the property so delivered or by some duly authorised person in that behalf; but the contract being in derogation of the common law has to be strictly construed."

19. In *Syed Ahmed Vs. Salima Bi and Others*, cotton bales were entrusted to the owner of a lorry for being carried and the bales caught fire on the way. It was pleaded on behalf of the carrier that without proof of negligence on his part in the carriage of the goods, the owner cannot claim any damages. In negating

the submission the learned Judges observed as follows :

"Where loss has occurred to cotton bales in transit, cotton being one of the goods not mentioned in the schedule to the Carriers Act, 1885 and in respect of which the liability of the common carrier (in this case, the owner of a lorry) is not limited by a special contract, the owner of the goods (in this case, bales of cotton) in a suit against the common carrier for loss, damage, or non-delivery of articles or goods entrusted to the carrier is not required to prove negligence; the reason is that the liability of a common carrier is that of an insurer. It therefore, follows that, notwithstanding the fact that there is no negligence on the part of the common carrier, he is liable to compensate the owner of goods for the loss of the goods that occurred during the transit thereof by the lorry belonging to the carrier."

The learned Judges placed reliance on Irrawaddy Flotilla Company's case, ILR 18 Cal 620 (PC).

20. It will be thus seen that there need not be any privity of contract between the owner of the goods and the carrier. It is sufficient if the carrier has accepted the goods for transit and has failed to deliver them. Thereafter to escape his liability which is normally absolute, he has to show that there was; a special contract made by the owner of the goods or his duly authorised agent, even if, for argument's sake, the necessity of having the contract in writing is thought to be a technical provision. In answering the points formulated by himself the learned District Judge has thus clearly gone wrong on the first point when he came to the conclusion that the plaintiff was not entitled to maintain the action, as there was no privity of contract between the plaintiff and the defendant company. Though the learned Judge has held that Dhanna Lal had taken upon himself the responsibility of the goods being taken in a gas plant truck, he has gone at a tangent in dealing with the question as to who was the owner of the goods and whether Dhanna Lal had authority of the owner to enter into such a contract, if he was not himself the owner of the goods.

21. As regards point No. 2, the learned District: Judge had come to the conclusion that there was no negligence on the part of the defendant's driver and it was a chance that the fire took place and the defendant cannot be held responsible for it. We may observe, without meaning any disrespect, that the learned District Judge has wholly misconceived the legal position of a common carrier. It is not necessary for the owner of the goods to prove negligence. Section 9 of the Carriers Act furnishes the answer. It provides that in any suit brought against a common carrier for loss, damage or non-delivery, it shall not be necessary for the plaintiff to prove that such loss, damage or non-delivery was owing to the negligence of the carrier, his servants or agents. The same was the position under the Common law.

22. On the third point formulated by him, though the learned Judge admits that the responsibility of a common carrier is absolute, yet he holds that in the

present case it was circumscribed by mutual contract. He has, however, missed the point as to by whose contract either under the Common law principles or under the principles adumbrated in the Carriers Act the liability of the common carrier could be limited. As we have already observed, the learned Judge has not approached the matter from a correct angle in dealing with this aspect of the matter. Dhanna Lal was not shown to have any authority from the owner to enter into such a special contract. It is only the plaintiff himself or his duly authorised agent who could relieve the common carrier of his absolute responsibility and this has neither been pleaded properly nor proved by the defendant. Consequently we are of the opinion that the learned District Judge was not justified in reversing the judgment and decree of the trial court.

23. The result is that, we hereby accept this appeal with costs and while setting aside the judgment and decree of the learned District Judge, Kota, dated 19-10-57, we hereby restore the judgment and decree of the learned Munsif dated 16-8-56.