(1982) 03 MP CK 0034

Madhya Pradesh High Court

Case No: Second Appeal No. 354 of 1976

Union of India (UOI) and Another		APPELLANT
	Vs	
Rameshwar Prasad		RESPONDENT

Date of Decision: March 9, 1982

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 11 Rule 1, Order 11 Rule 12, 149
- Court Fees Act, 1870 - Section 4
- Evidence Act, 1872 - Section 74, 77
- Railways Act, 1890 - Section 139, 73, 76F

Citation: AIR 1983 MP 59 : (1983) ILR (MP) 101 : (1983) JLJ 197 : (1983) 28 MPLJ 165

Hon'ble Judges: B.C. Verma, J

Bench: Single Bench

Advocate: R.K. Pande, for the Appellant; P.C. Pathak, for the Respondent

Final Decision: Dismissed

Judgement

B.C. Verma, J.

The respondent/plaintiff is an endorsed consignee of a railway receipt whereunder M/s. Vijaya Trading Company booked at Dronachellam Railway Station 660 tins of groundnut oil for Sakti. It was a wagon load consignment and one transhipment en route was necessary. The consignment was received at Sakti on 13-1-1968 and admittedly five tins were found empty while 20 tins were leaking. There was short delivery of 222 Kgs. of oil which the respondent valued at RS. 1924.25 paise. Notices u/s 78-B of the Railways Act and Section 80 of the Civil P. C. were served on the appellant before filing the suit. In those notices, it was claimed that Railway administration concerned must disclose the manner in which the consignment was dealt with during transit. When the suit was filed, this demand was reiterated in the plaint and again disclosure was sought for. During the proceedings, a notice was also served on the appellant requiring production of certain documents. Specific

defence was raised on behalf of the appellant that the consignment was defectively packed and that such defective condition was noted in writing by the consignor''s Agent on the forwarding note. It was, therefore, pleaded that the tins were old and used and were not tied to each other by rope and leaked as no dunnage was provided in between the tins. The damage is said to be the direct consequence of such defective packing. The allegation as to the negligence and misconduct in handling the consignment on the part of the Railway administration was denied. In para 8 of the written statement specific averment is as follows:

"The suit consignment having been booked at owner''s risk as also on account of the non-compliance of tariff rules, the defendant is not liable to give any disclosure to the plaintiff as sought for."

A copy of the forwarding note was filed. The trial Court dismissed the suit but the lower Appellate Court allowed the plaintiff''s claim and decreed the suit. The lower Appellate Court, in para 15 of the impugned judgment observed that the plaintiff suffered a loss of Rupees 1924.25 paise and that this finding arrived at by the trial Court was not challenged before it.

In this Court the second appeal was filed on 28th June, 1976 on a court-fee stamp of Rs. 5.00. The balance of the court-fee was paid subsequently on 9-7-1976 and this Court on recommendation made by the Taxing Officer certifying the delayed payment as bona fide, condoned the delay in payment of deficit court-fee by order dated 1-11-1976. Admittedly, this order condoning the delay u/s 149, Civil P. C. was passed ex parte without notice to and in absence of the respondent. Shri P. G. Pathak, learned counsel appearing for the respondent, therefore, urged that he has a right to challenge the condonation of delay in payment of deficit court-fee, Learned counsel submitted that the explanation offered by the appellant for delay in payment of court-fee far from satisfactory or bona fide and, therefore, the appeal should only be deemed to be filed on 9-7-1976 when the deficit court-fee was made good. Section 149, Civil P. C. is as follows:

"Whether the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fees, has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such court-fee, and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance."

This section vests the court with a discretion to permit a person at any stage of the proceedings to pay whole or part of the court-fees as may be payable and if such permission is granted and the court-fee is paid, the effect is as if such fee had been paid at first instance. This section is enabling and permits validation of a document retrospectively if the sufficiency of the stamp is subsequently made up with the leave of the Court. The effect of this section is to mitigate the rigour of Section 4 of

the Court-fees Act according to which a plaint or memo of appeal or other document which is not stamped or is insufficiently stamped shall be non est and such a power of extension of time to pay court-fee can be exercised by a Court at any stage of the proceedings. Right of the opposite party in this behalf came to be considered by the Supreme Court in Mahasay Ganesh Prasad Ray and Another Vs. Narendra Nath Sen and Others, . In that case, the memo of appeal presented before the High Court was said to be insufficiently stamped. When such an objection was raised. The appellant there deleted certain reliefs of possession claimed in that appeal. The Division Bench of the High Court observed while permitting the amendment that the appellant was doing so at his own risk, The Registrar then held that as the memo then stood, court-fee was properly paid on the footing that the decree under appeal wag only a declaratory decree, When the matter came up for hearing before the High Court, the opposite party objected to the maintainability of the appeal and the High Court then permitted the appellant to withdraw the amendment earlier made and granted the appellant time to make good the deficit court-fee. Before the Supreme Court, it was argued that the High Court was in error in granting time particularly because it took away from the appellants (before the Supreme Court) their valuable right to Plead the bar of limitation if the appeal was treated as filed before the High Court on the date when the deficit court-fee was made good. This contention was rejected by the Supreme Court which observed as follows (Para 5):

"Secondly, the power of the High Court to allow an amendment u/s 149, Civil P. C. is clearly one under which the plea of the bar of limitation may be ignored. There are decisions of very high authority taking that view. The contention, therefore, that by allowing the amendment the High Court took away the present appellants" valuable right to plead the bar of limitation cannot be accepted. It was a matter of discretion for the High Court and the materials put before us indicate no reason to hold that the discretion was exercised so as to violate any recognised principles of law or that by granting leave to amend any gross injustice has been done. As pointed out by the High Court, the payment of court-fees is a matter primarily between the Government and the pre-sent respondents and that was the whole fight in respect of this contention. In our opinion, therefore, the preliminary objection fails,"

The Supreme Court has reiterated the same proposition in Mannan Lal Vs. Chhotaka Bibi, (Dead) by Lrs. B. Sharda Shankar and Others, and observed that Section 4 of the Court-Fees Act should be read as proviso to Section 144, Civil P. C. and both the provisions must be harmonised. When deficit court-fee is made good no possible objection can be raised on the ground of bar of limitation. The decision in Mahasay Ganesh Prasad Ray and Another Vs. Narendra Nath Sen and Others, was followed by this Court in Goppolal v. Ganpat-Civil Revision No. 395 of 1957, decided on 5-8-1958 and it was held that because of the late payment of court-fee and on condonation of that delay, the opposite party cannot make a grievance of loss of any right to plead bar of limitation. The learned Judge however in the latter part of the order,

considered the sufficiency or otherwise of the grounds urged for late payment of court-fee at the -instance of the defendant and ultimately held that the delay was due to circumstances beyond control of the plaintiff in that suit. The decision of the Supreme Court in Mahasay Ganesh Prasad Ray and Another Vs. Narendra Nath Sen and Others, was explained and distinguished in Narasimha Rao v. Narasimhulu AIR 1967 A P 141 where it was expressly held that a respondent is entitled to notice before time is granted to the appellant for payment of deficit court-fee on memo of appeal. When time is granted without notice to the respondent, it is open to him to file an application to the Court to dismiss the appeal on the ground that the delay ought not to have been excused. The decision in Janaswami Venkataseshamma Vs. Sri Prativadi Bhayankaram Ranganaryakamma alias Kanakavalliammavarlangaru, was followed for this conclusion. Ganesh Prasad''s case (supra) was distinguished on the ground that the delay in payment of deficit court-fee was excused by the High Court after notice to the respondent and the observations that "the question of payment of court-fee is primarily a matter between the Government and the person concerned" have to be read in that context. In Jagannath Prasad and Others Vs. Mst. Ram Dularey and Others, it was pointed out that such an objection must be raised at the earliest possible opportunity. In AIR 1937 87 (Nagpur) , Pollack, J. held that a Court does have power to review its earlier order granting extension of time u/s 149. Civil P. C. to make good the deficit court-fee, if on being pointed out by the opposite party it reveals that the extension of time was sought or false-pretences holding that it would be Inequitable to allow taking advantage of one''s own fraud, The respondent was thus permitted to raise an objection when the time for making good the deficit court-fee was granted in his absence and he was heard to say that extension was sought on false pretences. The inference from these authorities is that a Court has a discretion in the matter of extending time for payment of deficit court-fee at any stage in terms of Section 149, C.P.C. which must be read as a proviso to and in harmony with, Section 4 of the Court-fees Act. Further when once the delay in payment of deficit court-fee is condoned by the Court in exercise of that power, the suit or memo of appeal, as the case may be, cannot be attacked as barred by limitation. At the same time, if such an order is passed behind the back and without notice to the opponent, he has a right to oppose the condonation contesting the reasons assigned for explaining the delay and the Court on being so pointed out has power to review its earlier order condoning the delay in payment of deficit court-fee, if it finds that the order was procured on false pretences and by misrepresentation.

In the present case, while seeking condonation of delay in payment of deficit court-fee u/s 149, Civil P. C by an application dated 9-7-1976 the appellant has stated that it is a public body and is subject to certain rules and formalities. The amount for payment of court-fee was not sent to the standing counsel in the High Court as the drawal of money form has to travel through different sections of the Railway Department before money could be actually drawn. The appeal was filed on the last

day of limitation with a stamp of RS. 5 only. Thus, the sole reason assigned is the observance of certain formalities by a public body in the matter of withdrawal of necessary funds for payment of court-fee. The application is signed only by the counsel and is even supported by an affidavit. The Taxing Officer on these allegations certified the understamping as bona fide and the Court accepted the recommendation and condoned the delay, A Division Bench of this Court in Union of India (UOI) Vs. Ibrahim Gulaba Tobacco Merchant and Others, in somewhat similar circumstances observed that Rule 9 in Chapter II of the Madhya Pradesh High" Court Manual. 1960, provides that when the Taxing Officer certifies the under-stamping to be bona fide on an application duly made for the purpose, "the Court would normally extend time". In that case also, the Taxing Officer certified the delay in payment of deficit court-fees to be bona fide. It was observed that in absence of any special or exceptional circumstances the normal rule need not be departed from. Yet another Division Bench of this Court in State v. Mangilal, First Appeal No. 25 of 1965, decided on 16-10-1965 (Indore): 1966 Jab LJ (SN) 2, relying upon Jagat Ram v. Misar, AIR 1938 Lah 361 (FB), held that the discretion conferred on the Court by Section 149, Civil P. C. is normally excepted to be exercised in favour of the litigant except in cases of contumacy or positive mala fides or reasons of a similar kind. It was observed that in Government cases some time is spent in obtaining sanction to draw out money for the purchase of stamps and the necessary papers have to be moved through more than one section/department. In the present case, the averments made in the application filed on 9-7-1976 u/s 149, Civil P. C, have not been controverted in writing and the objection was orally raised at the time of hearing of the appeal. The delay was condoned as far back as on 1-11-1976. The respondent entered appearance on 3-1-1977. For the long five years the delay condoned was not questioned. Under these circumstances, in my opinion, the order condoning the delay in payment of deficit court-fee on a recommendation made by the Taxing Officer need not be reviewed, I, accordingly, reject the objection raised as to the maintainability of this appeal as barred by time.

On merits of the appeal, I am of the opinion that it must be dismissed, There is no doubt and ft has been found as a fact by the lower Appellate Court that at the destination five tins were found empty while other 20 tins were found leaking, Oil was lost during transit and delivered short. Learned counsel for the appellant relying upon the decision of a Division Bench of this Court in Firm Kesrimal Ratanlal Sarda and Co. Vs. Union of India (UOI), , argued that the leakage was due to defective packing condition and because the defective packing condition was noted in the forwarding note, the burden to prove the misconduct and negligence was on the plaintiff/respondent, In support, a copy of the forwarding note has been filed. It is EX. D/4 on the record. In my opinion, that for warding note has not been proved according to law and cannot be admitted in evidence. None has come forward with the original of that forwarding note in the Court to prove it, Shri R. K. pandey, learned counsel for the appellant, on the basis of Section 139 of the Railways Act,

argued that Ex. D/4 was admissible as a copy being entries in records of a Railway administration. I am unable to accept this contention. It is true that Section 139 of the Railways Act permits proof of entries in records or other documents of Railway administration by production of a copy of such entries. Before, however, such copies can be tendered and accepted as a proof of such entries, a certificate by the Officer having custody of the records or other documents under his signature and stating that it is a true copy of the original entries and that such original entries are contained in the records or other documents of the Railway administration in his possession, has to be appended to that copy, This copy of forwarding note on Ex. D/4 filed on record does not bear any such certificate, At the top of the document all that is written is "true copy of forwarding note". Even this does not bear anybody''s signature. None has certified it to be a true copy of the forwarding note. As required by Section 139, firstly there has to be an endorsement certifying the entries as true copy. Not only this, certificate should be by an Officer who has the custody of the records and must also bear a statement that it is a true copy of the original and that the original is in its possession of the Railway administration, in absence of any such certificate, this document (copy of the forwarding note, Ex. D/4) cannot be admitted in evidence and, therefore, has to be excluded from consideration. No doubt the Division Bench in Firm Kesrimal Ratanlal Sarda and Co. Vs. Union of India (UOI), ruled that in cases covered by Section 77-C of the Railways Act when a consignor books defectively packed goods and the goods get damaged, the onus of proving negligence and misconduct on the part of the Railway administration lies on the consignor and in absence of such proof, Railways are exonerated of the liability. It was also pointed out that such a burden is also discharged by raising an adverse presumption u/s 114 of the Evidence Act if the Railway administration fails to produce relevant material on record, This decision is not helpful to the appellant in the present case as the forwarding note has not been proved according to law and, therefore, it cannot be inferred that the consignor or his agent admitted defects in packing of the consignment and made an endorsement to that effect in the forwarding note,

Section 76-F of the Railways Act requires a Railway administration to disclose to the consignor how the consignment was dealt with throughout the time it was in its custody 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. This section has been added by Act No. 39 of 1961 and is reproduction of old Section 74-D, it imposes statutory obligation upon the Railway administration to disclose to the consignor of goods how the consignment was dealt with when it was in its control. The object of this provision is to enable the consignor to point out to the Railway administration that the fact disclosed by it raises a fair inference of negligence or misconduct on the part of the Railway or its servants. Construing Section 7-D of the old Act, the Supreme Court in Union of India (UOI) Vs. Brijlal

Purshottamdas, held that the contemplated disclosure must be in the form of a precise statement of how the consignment was dealt with by the administration followed by evidence at the trial in proof of that statement, it was pointed out that although the section does not expressly provide that the administration is bound if necessary to lead evidence as to how it dealt with the consignment before the consignor is called upon to prove misconduct Or negligence but this obligation is implicit in the duty of disclosure imposed by the section, It was further stated that it is only when negligence or misconduct cannot be fairly inferred from such evidence that the burden of proving the negligence or misconduct shifts to the consignor, The Division Bench in Firm Kesrimal Ratanlal Sarda and Co. Vs. Union of India (UOI), , in para 8 of the judgment, made the following observations

"Of course, the burden can be discharged by leading positive evidence, or by the nature of damage in the light of surrounding circumstances or by cross-examination of the railway witnesses or by calling the railway to place the relevant material from their records and other sources or by raising adverse presumptions against the railways if they avoid to place the relevant material. However, we are unable to agree that the burden placed on the consignor u/s 77-C should be deemed to have been discharged when parties lead no evidence at all and the consignor takes no steps to compel production of what he considers necessary for his case."

In the present case, I have shown above that even before the filing of the suit, the respondent/plaintiff required the railway administration by a notice to disclose facts as to how the consignment was dealt with while in its custody and control. Such averment was repeated in the plaint. It is not that the appellant was not alive to this assertion of the respondent. In the written statement filed the appellant assert ably denied to make any such disclosure and rested only on a plea that the consignment was defectively packed and that such defective packing was noted in the forwarding note by the agent of the consignor. In the written statement, no such facts were disclosed to show that in the common course of events the loss would not have caused if proper care had been taken except saying that the consignment was defectively packed. The finding of the lower appellate Court is that according to the evidence led by the railway administration, there was no damage to the consignment up to the Station Maula Ali where transhipment was done and that the consignment could have been damaged due to loose shunting of the wagons or by not taking proper precautions during transit from that station up to destination. Since the Central Railway (a co-defendant) did not enter appearance and also did not produce relevant documents, the lower appellate Court drew presumption against the administration. Strength was added to this inference because of non-production of relevant documents by the contesting railway, namely, S.E. Railway. In my opinion, these findings are well grounded. Reliance was rightly placed upon the decision of G. P. Singh, J. (as he then was) in Union of India v. Niranjanlal; Second Appeal No. 407 of 1966, decided on 18-10-1972 where the learned Judge has made the following observations:

"It is a matter of common knowledge that specific instructions have been issued by the Railway administration as to what precautions should be taken in shunting and marshalling of wagons containing oil. These precautions generally are that the wagons are to be marked with a special label (not to be loose shunted); the wagons are not to be loose shunted and they are to be attached to an outgoing through train in the rear of the load immediately in front of the brake van".

I am, therefore, of the opinion that under the circumstances of the case, the plaintiff has sufficiently discharged the burden of proving negligence Or misconduct which lay upon it by asking for the disclosure and the lower Appellate Court has rightly inferred negligence and misconduct on the part of the railway administration for its refusing to disclose the manner in which the consignment was dealt with while in its possession and control. I am unable to agree with the learned counsel for the appellant when he argues that mere asking of disclosure will not do but steps ought to have been taken under the provisions of the Civil P. C. for discovery and production of documents or by illustrating facts by serving interrogatories. This is so be-cause the appellant has specifically denied in the written statement to make any such disclosure and part from the statement that the consignment was defectively packed, no further statement was made in the written statement that in the common course of events loss would not have been happened if proper care had been taken. In para 5 of its judgment, the Supreme Court in Union of India (UOI) Vs. Brijlal Purshottamdas, (supra) held:

"If the written statement filed by the administration discloses facts which show that in the common course of events the loss would not have happened if proper care had been taken, a presumption of negligence is raised and it is for the administration to rebut it by contrary evidence. In the absence of such evidence the court may draw the inference that the loss was caused by the negligence of the administration."

The evidence adduced by the railway administration, however, does not disclose that the leakage was due to any alleged defective packing. K. M. R. Madhavaswami (D.W. 1) has stated that no such defective packing was noted in Ex. D/2 prepared at time of transhipment. He also admitted that the quality of the tins used was also not noted. J. C. Baira (D.W. 2) only stated that damage was not sufficient. From this statement it is difficult to infer that the damage was caused either due to the conditions of the tins used or because of defective packing. I am, therefore, of the opinion that the lower Appellate Court has rightly inferred negligence and misconduct on the part of the railway administration while dealing with the suit consignment during transit.

For the aforesaid reasons. I agree with the lower Appellate Court that the damage caused to the suit consignment was due to misconduct and negligence On the part of the railway administration and, therefore, the appellant has been rightly made liable to compensate for that loss. I have earlier indicated that quantum of damages

assessed calls for no interference.

The appeal fails and is dismissed with costs. Counsel''s fee as per schedule, if certified.