(1925) 08 CAL CK 0006

Calcutta High Court

Case No: Appeal from Appellate Decree No. 2177 of 1922

Messrs. Gopiram Behariram		APPELLANT
	Vs	
Agents, East Indian Ry. and O. and R. Ry.		RESPONDENT

Date of Decision: Aug. 7, 1925

Final Decision: Allowed

Judgement

1. This appeal arises out of a suit to recover Rs. 709-10 as compensation for goods consigned by the Plaintiffs'' agent for carriage by Railway which were not delivered to the Plaintiffs. It appears that 13 tins of ghee and one tin of mustard oil, in seven packages, were consigned by the Plaintiffs'' agent at Shahgunj, a station on the Oudh and Rohilkhund Railway, to the Plaintiffs at Howrah. Only one package (containing one tin of ghee and one tin of mustard oil) arrived at Howrah and the Plaintiff was asked to take delivery thereof on giving a full acquittance receipt which he refused to do. The other six complete packages did not arrive at Howrah at all and were not delivered to the Plaintiff. The Plaintiff thereupon served a notice under sec. 77 of the Indian Railways Act upon the Defendants and brought the suit for compensation.

2. The Court of first instance allowed the claim in part. The Court of Appeal below dismissed the claim altogether. The Plaintiff has appealed to this Court.

3. Under sec. 72 of the Railways Act the responsibility of a Railway administration for the loss, destruction or deterioration of goods delivered to the administration to be carried by Railway subject to the other provisions of the Act is that of a bailee under secs. 151, 152 and 161 of the Indian Contract Act, 1872, but that responsibility may be limited by an agreement in writing signed by or on behalf of the sender of the goods in a form approved by the Governor-General in Council. The goods in the present case were sent under the risk note, Form B, which is approved by the Governor-General in Council. The risk note, Form B, states that the consignor, in consideration of a lower charge than the ordinary tariff rate chargeable for the

consignment, agrees to hold the "Railway administration and all other Railway administrations working in connexion therewith, etc., harmless and free from all responsibility for any loss, destruction or deterioration of, or damage to, the said consignment from any cause whatever except for the loss of or damage to the said consignment or of one or more complete packages forming part of a consignment due either to the wilful neglect of the Railway administration, to theft by, or to the wilful neglect of its servants, transport agents or carriers employed by them before, during and after transit over the said Railway or other Railway lines working in connexion therewith, or by any other transport agency or agencies employed by them respectively, for the carriage of the whole or any part of the said consignment ; provided the term wilful neglect be not held to include fire, robbery from a running train or any other unforeseen event or accident."

4. As stated above, six complete packages were not delivered at all, and the seventh package was tendered but the Plaintiff was asked to give a full acquittance receipt. The defence pleaded non-liability under the risk note, Form B. The Court of Appeal below held that the burden of proving that the case falls within the exception contained in the risk note, viz., that the goods were lost owing to the wilful neglect of the Railway administration or to theft by or wilful neglect of its servants, etc., is upon the Plaintiff. That having regard to the authorities must be held to be so. But before the Plaintiff is called upon to prove that the goods were lost by wilful neglect or by theft, it must be shown that the goods have been lost. Unless that initial fact is proved, viz., that the goods have been lost, we do not see how the Plaintiff can be required to prove how the loss occurred.

5. The goods were made over to the Railway for carriage and they have not been delivered to the consignee. How is the consignor or the consignee to know whether they have been lost? We think that it is for the Railway administration to prove in the first instance that the goods have been lost, and it will be then for the Plaintiff to show that the loss was due to the wilful neglect of or theft by Railway servants. That also must in almost every case be impossible for the Plaintiff to prove, but that is what he undertakes to do under the risk note, at any rate the decided cases hold that it is for him to prove it.

6. In the recent case of The East Indian Railway Company v. Jogpat Singh (1924) 28 C. W. N. 1001, Page, J., considered the question exhaustively and came to the conclusion that except in cases where the Plaintiff admits that the goods have been lost, a Railway Company is not entitled to rely upon the provisions of the risk note which pro tanto exempt it from liability unless and until evidence has been adduced which satisfies the Court that a loss has occurred.

7. It is contended that that was a case of non-delivery as regards which no issue was raised in the present case. But the present case was also one of non-delivery. It is true, the learned Subordinate Judge refers to the suit as being one for recovery of goods lost in transit. Evidently he misunderstood the Plaintiff''s case for which the

Plaintiff was not responsible. The Plaintiff''s case (as appears from the plaint and even from the statement of the case in the judgment of the trial Court) was that the goods were not delivered to him. The third issue, viz., "Are the Plaintiffs entitled to the amount of damages claimed or any portion thereof" was wide enough, and must be taken to have been framed with reference to the Plaintiff''s case as stated in the plaint which was one for non-delivery. Then it is said that in the notice under sec. 77 the Plaintiff admitted the loss of the goods. But we do not find any such admissions. The notice was merely in terms of the section which provides for compensation for "the loss, destruction or deterioration of animals or goods."

8. We do not think therefore that there was any admission on the part of the Plaintiffs that the goods were lost by the Railway.

9. It is contended, however, that "loss" means loss to the consignor and not loss of the goods by the Railway. In other-words, "non-delivery" of goods is "loss" of goods to the party. But if so, there would have been no necessity for the words "loss, destruction or deterioration" in the risk note, Form B. A non-delivery may be due to loss of the goods, but may be due to other causes, and it is possible to conceive of cases where goods have not been lost but not delivered. For instance one tin of ghee may be mixed up with thousand others in the Railway godown, and no proper search has been made for finding it out. It is unnecessary to consider whether a temporary loss is a loss within the meaning of the section, because in the present case there is not only no evidence that the goods have been lost or what became of them, but there is no suggestion of any temporary loss of the goods in the manner referred to above.

10. It is contended that the judgment of Page, J., is opposed to that of Smith v. G. W. R. Co. [1922] 1 App. Cas. 178. But in that case the loss of the goods was admitted by the Plaintiff although the Railway Company did not offer any explanation as to how the goods were lost, and it was held that the refusal of the Defendants to account for the loss of the goods was not evidence which justified the Court in inferring that the loss arose from the wilful misconduct of the Defendants'' servants.

11. In the case of The E. I. Railway Company v. Jogpat Singh (1924) 28 C. W. N. 1001, Page, J., has referred to a number of decisions as supporting his view as to the meaning of the expression "loss" and has considered the cases in which a contrary view was taken. We entirely agree with the learned Judge with regard to the meaning of the expression "loss."

12. It is contended on behalf of the Respondent that the suit is not brought against proper parties, the Defendants being described as "Agent, East Indian Railway" and "Agent, Oudh and Rohilkhund Railway." Reference is made to the cases of Ram Das Sein v. Mr. Cecil Stephenson (1868) 10 W. R. 366, Nubeen Chunder Paul v. Cecil Stephenson, Agent of the East Indian Railway Company (1871) 15 W. R. 534, Agent, Bengal Nagpur Railway v. Behari Lal Dutt (1925) 29 C. W. N. 614 and East Indian

Railway Company v. Ram Lakhan Ram I. L. R. Pat. 230 : [1924] Pat. (1923).

13. In the first case the Defendants were "Mr. Cecil Stephenson, Deputy Agent of the East Indian Railway Company and Mr. W.B. Latimar, District Engineer of Bajmehal and Birbhum." Obviously there was no cause of action against Mr. Cecil Stephenson, Deputy Agent, and Mr. Latimar, District Engineer, and they could not represent the Railway Company. In the second also the suit was against Mr. Cecil Stephenson, Agent of the Bail-way Company. In the third, the Defendant was described as Agent, Bengal Nagpur Railway, and it was held that the plaint could not be allowed to be amended as it was not a case of misdescription, but the substitution of one party for another who had been wrongly sued and the suit would have been barred by limitation at the date of the amendment. In the fourth where a suit was instituted against "The Agent, East Indian Railway" it was held that the Plaintiff was not entitled after the period of limitation, for the suit had expired to amend the plaint by substituting the Railway Company for the Defendant originally sued.

14. On the other hand in the case of The Saraspur Manufacturing Company v. B. B. and C. I. Railway Company I. L. R. (1923) 47 Bom. 785, where the Defendant was described as the Agent of the Railway Company and the Defendant Company appeared and filed a written statement raising various pleas in defence the Court held that it was a case of misdescription and allowed amendment. It is to be noted that in the case of Agent, Bengal Nagpur Railway v. Behari Lal Dutt (1925) 29 C. W. N. 614, Suhrawardy, J., observed that on the facts of the above case he might hold the same opinion.

15. In the present case it is true the East Indian Railway in the written statement pleaded that the Plaintiff had no cause of action nor any right to sue the Defendant, but no specific objection was taken by the Defendant, on the ground that the proper party had not been sued, and the Railway Company entered appearance, put in written statement and fought out the case. The question of the proper party not being sued is not even referred to in the judgment of the trial Court. The Oudh and Rohilkhund Railway pleaded that it being a Railway owned and worked by the Government, the Secretary of State should have been sued. But the Oudh and Rohilkhund Railway did not prefer any appeal against the decree of the trial Court, and it was only the East Indian Railway which appealed and it cannot be said that the defence of the two Railways on this point was the same. The (sic) no question of prejudice to the Company, as it knew well the claim made against it and considered itself the party sued. The present case is stronger than the Bombay case, as in the present no specific objection was taken in the trial Court on the ground that the East Indian Railway had not been sued. We think that it is a case of misdescription which can be rectified by a formal amendment as the case has been fought out on the merits by the Railway Companies. By the amendment no new Defendant would be added or substituted so as to attract the provisions of sec. 22 of the Limitation Act. The Appellant has put in a petition for amendment and we allow the amendment.

The result is that the decree of the lower Appellate Court is set aside and that of the Court of first instance restored. Each party will bear his own costs of this Court and of the lower Appellate Court.