(1957) 02 CAL CK 0023

Calcutta High Court

Case No: A.F.O.D. No. 126 of 1954

Sukul Bros		APPELLANT
	Vs	
H.K. Kavarana		RESPONDENT

Date of Decision: Feb. 18, 1957

Acts Referred:

- Carriers Act, 1865 - Section 10, 8

Citation: AIR 1958 Cal 730 : (1958) 1 ILR (Cal) 376

Hon'ble Judges: S.R. Das Gupta, J; R.S. Bachawat, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

R.S. Bachawat, J.

This appeal arises out of a suit in which the plaintiff seeks to recover from the defendant firm me sum of Rs. 12,220/- as damages for breach of its duty as common carrier to deliver 45 bales of jute entrusted to it for carriage, alternatively as damages for conversion of the goods. By his declaration in the plaint the plaintiff states that on the 29th of January, 1952 he delivered to the defendant 45 bales of jute for transport from the Calcutta Hudraulic Press Ghat at Cossipore to Howrah Jute Mills Ltd. and safe delivery thereof to Howrah jute Mills Ltd. for reward and that the said 45 bales of jute were accepted by the defendant for carriage and safe delivery as aforesaid and were duly loaded on the defendant''s vehicle No. WBL 4327. By its defence the defendant defied that it was a common carrier. It also denied delivery and entrustment of the goods to it by rift plaintiff. The defendant firm alleged that it only let out to the plaintiff on hire the vehicle No. WBL 4327 and provided the plaintiff with a driver, that the said vehicle and the driver thereof were under the fell control, custody and supervision of the plaintiff and that the 45 bates of jute were lost while the same were under the custody and control of the plaintiff. It also pleaded absence of statutory notice required by S. 10 of the Carriers Act. Upon these pleadings, issue was joined and the action was tried. By his Lordship

Bose J. Evidence, both oral and documentary, was adduced on behalf of both parties. The learned trial Judge accepted the testimony of the plaintiffs witnesses. He discarded the testimony of Kalap Nath Sukul, the partner of the defendant firm, as unreliable

2. The evidence adduced at the trial establishes the following facts. The plaintiff is a carrier of goods and possesses 2 Lorries. Messrs. Sinclair Murray and Co. Ltd. who have a godown at the Calcutta Hydraulic Press have to send goods to their customers. Such goods are carried in their own lorries and also in other persons'' lorries. Whenever they require other''s lorries they approach the plaintiff who carries the goods in his own lorries and whenever necessary employs other lorries. The plaintiff says that he is the sole transport agent of Sinclair Murray and Co. Ltd. for the Purposes of such carriage and that he is responsible to Sinclair Murray and Co. Ltd. for the safe, carriage of all goods carried by the plaintiff other carriers engaged by him. (Plaintiff - Questions 166, 174, 479-80, 369-70, Daroga Singh Q. 131-33). The goods used to be taken out of the godown of Sinclair Murray and Co. Ltd. and loaded on the lorries by the coolies of Sinclair Murray and Co. Ltd. and then stacked by the driver and the coolies attached to the lorries. A chalan addressed by Sinclair Murray and Co. Ltd. to the consignee used to be given by their clerk to the driver of the lorry concerned. The driver on unloading the goods at the destination used to obtain a receipt for the goods on the chalan. The chalan thereafter used to be collected from the defendant firm by the plaintiff''s employee (Daroga Singh - Q. 61.34, Dhirendra Prosad Dutta Gupta - Q. 14-15, Plaintiff - Q. 504) On the, 29th of January, 1952 the plaintiff personally engaged the defendant to carry jute from the Calcutta Hydraulic Press to the Howrah Jute Mills and instructed the defendant to send the lorries to his principal''s place at the Calcutta Hydraulic Press. The employment as oral and was on a promise to pay remuneration fixed on the basis of the bales to carried (Plaintiff - Q. 341-46), It appears that the defendant used to obtain payment of the hire against bills made out in the name of and submitted to the plaintiff. On the same day, the defendant sent its lorries Nos. WBQ 927 and WBL 4827 to the Calcutta Hydraulic Press with drivers and coolies. The lorries were loaded with the goods as usual. One Ujagar Singh, an employee of the defendant, supervised the loading. Dhirendra Prosad Dutta Gupta, a clerk of Sinclair Murray and Co. Ltd., gave the usual chalans to the drivers and gave them instructions as to the destination (Daroga singh - Q. 99, 102-03, 107-10, Dhirndra Prosad Dutta Gupta - Q. 22-24).. The lorry No. 927 duly reached its destination and the driver duly delivered the goods. Matru Goala, the driver of lorry No. 4327, absconded with the lorry and with the 45 bales of jute loaded on it. The lorry was later recovered. The goods were not recovered and are now lost. By a letter dated the 1st of February, 1950 Sinclair Murray and Co. demanded from the plaintiff payment of the sum of Rs. 12,220/- being the value of the goods. The plaintiff instituted the suit on the 4th of February, 1952. Later, on the 21st of February, 1952 the plaintiff paid the sum of Rs. 12,220/- to Sinclair Murray and Co.

3. The, learned trial Judge has found that goods were lost while they were in the custody and control of the defendant and that the case of the defendant that it left the lorry and the driver in change of and under the control of the plaintiff or his agent is untrue. He also found that the defendant accepted the goods on the usual undertaking to carry the goods as common carrier. He also found that the defendant is a common carrier. I agree with this finding.

4. It is a common case that the plaintiff is not the owner of the goods and that the goods are the properties of Messrs. Sinclair Murray and Co. Ltd. The learned trial Judge also held that as the goods had been lost the defendant firm as a bailee of the goods cannot be sued for conservation. This finding has not been challenged. I agree with this finding.

5. The plaintiff has sued also for non-delivery of the goods. The defendant has committed breach of its duty as common carrier to deliver the goods safely. The plaintiff claims that he is entitled to recover, damages for non-delivery by virtue of his rights - (a) under the common law, (b) under the Carriers Act, (c) under his contract with the defendant and (d) as a bailee of the goods. The learned trial Judge held that the plaintiff is not entitled to maintain the suit under the Carriers Act. He however held that the plaintiff is entitled to maintain the suit (a) by reason of a contract of bailment entered into between him and the defendant and (b) also because the plaintiff was a bailee of the goods. He accordingly decreed the suit. These findings have been challenged before us.

6. The important question in this appeal is whether the plaintiff is entitled to maintain this suit.

7. Since the great case of Irrawaddy Flotilla Company, Ltd. v. Bugwan Das, 18 Ind App 121 (PC) (A), it is well settled that 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 as 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 due the common carrier for breach of the common law duty in an action of tort.

8. In AIR 1924 40 (Privy Council) (B), Lord Shaw observed that the carrier "is answerable to the owner for safe and sound delivery".

9. In London and North Western Railway Company v. Richard Hudson and Sons, Limited, (1920) AC 324 (C) at page 333 Lord Dunedin observed:

Now Lord Mansfield in Forward v. Pittard, (1785) 1 TR 27 at p. 33 (D), speaks of this obligation on the carrier''s part as an obligation independent of the contract. By that I understand that it is not an adjusted term to the contract as made, but is an

obligation which attaches front the fact of the goods being carried by a common carrier, in favour of the owner of the goods, whoever he may be.

9-A. These observations were followed and applied by this Court in the case of K.C. Dhar Vs. Ahmad Bux, (E).

9-B. Where there is a contract between the owner and the carrier the owner may sue the carrier either on contract or in to it at his option.

10. The Indian Carriers Act, while restricting the power of a common carrier of exempting himself from his common law liability; by Sec. 8 affirms or creates a liability and gives the benefit of that liability to the owner. Only the owner can take advantage of the benefit of that section. The plaintiff not being the owner is not entitled to maintain this suit under Sec. 8 of the Indian Carriers Act.

11. The plaintiff next contends that there is a contract between him and the carrier and he may sue for breach of that contract. Whether the plaintiff has employed the carrier on his own account is a question of fact. The ordinary inference is that the contract of'' carriage is between the carrier and the owner in whose favour the common law duty exists. In a proper case such is the inference even when the owner is not the consignor. Cork Distillerits Co. v. Great Southern and Western Ry. Co. (Ireland), (1874) 7 HL 269 (277) (F). The person whose property the good are is prima facts the party with whom the contract is made. Mullin-son v. Carver, (1843) LPOS 59 (G). In The Dekhari Tea Co., Ld. Vs. The Assam-Bengal Railway Company, Ld. (H), Rankin, J. observed:

As to goods the law'' will presume when it can that the carrier''s contract is with the owner : Dutton v. Solomonson, (1803) 3 B & P. 582 (I).

12. The presumption is a presumption of fact and is rebut table. Murphy v. Midland Great Western Ry. Co., of Ireland, (1903) 2 I.R. 5 at P. 30 (J). A person others than the owner may employ the carrier on his own account and then may sue the carrier on such contract. The special contract supersedes the necessity of showing the ownership of the goods, Dunlop v. Lambert, (1839) 6 Cl.&Fin 600: 7 E.R. 824 at p. 834(K). The onus is upon him who alleges that there is such special contract.

13. Now, what contract has the plaintiff pleaded and proved? He does not plead any express contract. He has pleaded delivery of the goods by him and acceptance of the goods by the defendant for carriage. He does not expressly plead a contract implied from such delivery and acceptance out we must decide the case on the footing that he has pleaded an implied contract. He has however totally failed to establish that he had delivered the goods to the defendant. The goods never came to his possession. They were delivered by M/s. Sinclair Murray and Co. Ltd. to the defendant directly from their godown. Their coolie''s logged the lorry and the goods were then stacked on the lorry by the driver and the coolies attached to the lorry. The loading was supervised by the defendant''s employee Ujagar Singh Plaintiffs

employee Daroga Singh watched the operation, the clerk of Messrs. Sinclair Murray and Co. Ltd., issued a challan in their name so that delivery may be made and receipt of the goods may be obtained on their account and gave the challan to the driver with instructions to take the lorry to the destination. The plaintiff has totally failed to establish any contract that could be implied for entrustment of the goods by him to the defendant. This is sufficient to purpose of the claim of the plaintiff to maintain the suit by virtue of the contract pleaded. The plain tiff, however, now claims that apart from the ''entrustment of the goods he has entered into and ex press contract with the defendant for the employment of the defendant on his own account. The express oral contract of employment is not pleaded. I think we ought not to allow the plaintiff to set expenses of construction of the building and of the supply of money by defendant No. 1 produced in Court.

14. From what we have said above it is fairly clear that the defendant No. 1 had not the funds for the construction of the building and, when this is considered along with the admitted position that, at or about the relevant time, her husband was a busy lawyer, having naturally a decent income, and that he was living in a rented house and was apparently, in need of a house of his own, the inference can fairly be made that the disputed ''Ka'' schedule property including the building was the husband''s and not the wife''s.

15. It is to be observed also that the husband (defendant No. 2) did not appear in the suit and was plainly avoiding service of summons. He did, not also come forward to support the wife''s title and disclaim ownership of the disputed ''Ka'' schedule property. The husband and the wife are living together and in perfect, amity. The husband is evidently behind the wife in resisting the plaintiffs claim, but he did not take oath and depose in Court. It was pointed out to us on behalf of the appellant that the husband was cited as a witness by the wife, but, Beyond filing the citation application, the wife (defendant No. 1) took absolutely, no steps ,in the matter in spite of the Court''s granting her prayer for issue of summons upon the witnesses, as prayed for by her. That makes her case worse.

16. In the light of the foregoing discussion, a Court of fact is entitled to hold that the disputed ''Ka'' schedule property was the husband defendant No. 2 and the wife, defendant No. 1, in whose name the relative Kobala, Est. A, stands was merely his benamdar. That is what ''the learned Subordinate Judge has done and we have, no reason to differ from him in his said conclusion.

17. Dr. Sen Gupta, in the course of his arguments, drew our attention to some preliminary, remarks of the learned Subordinate Judge and contended that his entire judgment was coloured by a wrong approach and largely influenced by suspicion and surmise, so often condemned by the Judicial Committee, but we do not think that the criticizing is justified. Of the remarks pointed out, none appears to be basically wrong, although one or two may not have been happily worded or properly expressed and may not have been put in (sic) per sequence. We do not

think that the learned Subordinate Judge really suffered from a (sic) approach or led himself to be unduly Influent suspicion and surmise. His judgment on the whole is based on the legal evidence in the case, the Sub stance of which we have endeavored to set (sic) above, in the context of relevant circumstance His inference from that evidence as we have shown above, is a proper inference, amply justified by the materials on record and quite within the legitimate scope and powers of a Court, and we have not the slightest justification for interfering with the same.

18. A minor point was raised by Dr. Sen Gupta that in these proceeding the learned Subordinate Judge was nor justified in declaring the right of the plaintiff to attach before judgment the dispute ''Ka'' schedule property. The argument may be technically correct, if it means, as apprehended by Dr. Sen Gupta, that, by this declaration, the learned Subordinate Judge was affirming the legality, propriety and validity of the attachment before Judgment We do not think, however, that, in the con text, in which that declaration was made, the above meaning can be attached to it Really, what was intended by the learned Subordinate Judge papered to be that as the property was defendant No. 2 the plaintiff was entitled to attach it as his (defendant No. 2''s) property. That also follows from (sic) declaration, properly made, that defendant no. (sic) was defendant No. 2''s benamidar for that property and the dismissal of her claim, also properly made The effect would, necessarily, be revival of the attachment before judgment subject, of course to the remedies, if any, of the defendants of the money Suit to have it cancelled or set aside in accordance with law. We do not think that anything more was means by the learned Subordinate Judge by declaration, to which exception has been take from Dr. Sen Gupta, as stated above.

19. In the above view, we dismiss this (sic) with costs, the hearing fee being assessed at (sic) mohurs.

P.K. Sarkar, J.

20. I agree.