Sukul Bros Vs H.K. Kavarana

Court: Calcutta High Court

Date of Decision: Feb. 18, 1957

Acts Referred: Carriers Act, 1865 â€" 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.