

(1954) 09 CAL CK 0016

Calcutta High Court

Case No: Appeal from Original Decree No. 54 of 1949

Mooljee Sicka and Co.

APPELLANT

Vs

Dominion of India

RESPONDENT

Date of Decision: Sept. 6, 1954

Citation: 59 CWN 976

Hon'ble Judges: Renupada Mukherjee, J; Mookerjee, J

Bench: Division Bench

Advocate: Nani Coomar Chakravarti, for the Appellant; Ajay Kumar Basu, for the Respondent

Final Decision: Allowed

Judgement

Mookerjee, J.

The plaintiff appellant despatched three consignments of Biri Tobacco, two on the 27th June, 1945 and the third on the 25th August, 1945, from Nepani Out Agency on the M. & S. M. Railway for carriage and delivery to the plaintiff, the first two at Tumsar Town and the third at Champa. The plaintiff alleged that although the said consignments were securely packed in gunnies and were in a dry condition when despatched, they were not delivered within the normal period for covering the distance between the two stations. Certain quantities out of the said consignment were delivered in a wet and rotten condition. The plaintiff company accordingly claimed compensation for the quantities which were not delivered and for damages suffered as some of the bags had become wet. The Governor-General in Council represented, at the time when the cause of action arose and the suit was filed, the three different railway administrations, the Bengal Nagpur Railway, the Great Indian Peninsular Railway and the Madras and South Maharatta Railways. A written statement was filed on behalf of the Bengal Nagpur Railway controverting some of the allegations made in the plaint. After the issues had been settled written statements were filed on behalf of the two other Railways. The learned Subordinate Judge decreed the plaintiff's claim in part so far as two of the consignments were

concerned. The claim in respect of the third consignment was dismissed. The plaintiff firm has preferred the present appeal which is now limited to the third consignment. We need therefore consider only such points as have been urged before us.

2. The claim may be divided into two parts. The plaintiff allege loss of 8 bags and non-delivery of the same. On the ground of negligence of the railway administration 50 bags were damaged and claim is preferred to the extent of 621/2 p. c. of the total value of the same.

3. The learned Subordinate Judge has come to the conclusion on the evidence adduced that 58 bags had actually arrived at the destination. The contents of 8 bags were almost totally damaged and rotten and that a substantial portion of the contents of the other lot of 50 bags were found to be badly damaged.

4. Let us first consider the condition in which the goods had been despatched and when and where were the damages detected, the circumstances under which such damages occurred and the steps, if any taken thereon.

5. It will also be necessary to consider the effect of the plaintiff having signed certain risk notes.

6. The plaintiff alleges that a defective wagon had been used and rain water having percolated inside the wagon owing to the negligent and careless conduct, on the part of the Railway staff the defendant are liable for the loss incurred. It has also been suggested that as there had been transshipment the goods might have been carelessly kept in the open and rain water had damaged the contents.

7. The consignment in question was delivered to the railway administration at the Nepani Out Agency which was carried to the Kohlapur Railway Station 29 miles way. The evidence discloses that they were put in sealed wagons and came to Ghorapuri over the meter gauge. No witness has been examined as regards the condition of things at Ghorapuri and when they were sealed in another wagon for Champa. Between Ghorapuri and Ajni the wagon travelled over the G.I.P. Rly. At the later place it was made over to the Broad Gauge Section to be carried via Nagpur to Champa.

8. The particular consignment which, is now in question consisted of 160 bags covered by Inv., No. 1; this was carried in two lots in two separate wagons from Kohlapur Railway Station. 60 bags which had originally been put in one wagon arrived in good condition at Champa on the 11th September, 1955, and was delivered to the plaintiff on the 14th September. Of the balance of the consignment, viz., 100 bags which had been put into another wagon at Kohlapur Railway Station 42 bags were received in good, condition. Out of the remaining 58 bags, 50 bags were received in a wet condition; in respect of the contents of these 50 bags the plaintiff claim 621/2 p. c. of the total value for damage. So far as the remaining 8

bags are concerned damages are claimed as a total loss.

9. We shall take up first the question of those 8 bags and the condition in which they arrived, if at all. According to the plaintiff these 8 bags had not been offered for delivery. In Ex. D the delivery book at Champa there is an entry to the following effect that-

Out of 100 bags tobacco.....8 bags found badly damaged weighing 9 mds. 38 srs. 4ch. and 50 bags found partly but badly damaged and the contents of the said portion caked and discoloured and a bad smell is emitting from them. Some of the damaged portion are still wet. Contents of the damage portion of some of the bags formed into lumps. As to 48 bags found in sound condition weighing 52 mds. 11 srs. and 8 ch. hence considering the extent of damages and an assessment of 62 1/2 p. c. estimated on the damaged 50 bags weighing 73 mds. 30 srs. 4 ch. W/o prejudice to the railway right under the Risk Note (a) and (b) held delivered some foregoing wharfage for 2 days Rs. 5-12 since were H. P. 1/23 of 17. 9. 45., 8 badly damaged bags weighing 9 mds. 38 srs. 4 ch. as stated above totally refused by the consignee since the contents badly damaged. R. R. taken away.

S. M. Mukherjee,

A. D. CI. 22. 9.

10. It is incontrovertible on the above entry that of the 50 bags arrived at destination 8 bags badly damaged had not been taken delivery of. The statement made by P.W., 2, Gokuldas, that there was no offer for delivery of 8 bags out of these consignment cannot be accepted. On behalf of the plaintiff it has been argued before us that what had been despatched was Biri-tobacco and what was offered were lump-; and caked quantity of what had originally been tobacco leaves. It is contended that the goods which were offered could not be identified as being a portion of the goods actually despatched under Invoice No. 1. The marks on the bags were obliterated. It is necessary to consider this part of the case further and we may proceed to find out from the evidence how and where was the damage detected. As stated already that no witness has been produced by the Railway Administration" from Ghorapuri where the consignment was transferred from the Meter Gauge to the Broad Gauge or from Ajni, where the goods were transferred by the G. I. P Rly. to the B. N. Rly. section. Reference may in this connection be made to the written-statement filed on behalf of the G.I.P. Rly. and to Ext. 5 being a letter addressed by the Superintendent of Claims, G.I.P. Rly. to the plaintiff firm. Before we consider the oral evidence adduced reference should be made to Ext. B sent from Champa immediately after the goods were received.

Contents of 15 bags damaged by rain water inside the wagon and staining with oil. 10 bags partly damaged. 1 bag torn R.F. 1--7, Sens(?) Party refused delivery.

11. On the copy of the telegram produced there is an office note signed by one, S. C. Bisal to the effect that the Claims Inspector of Chakradharpur is to attend immediately and the train examiner at Bilaspur is to examine the wagon and to submit the report immediately. The wagon was marked W.T. The telegram referred to above was in the hand-writing of one of the Clerks, H. P. Chatterjee, who sent the message and S. C. Biswal", who had directed the wagon to be examined and report submitted. These two persons were called by the Railway Administration. Nor has S.N. Mukherjee the Assistant Claims Inspector, who had entered the deficiency remarks in the delivery book on the 22nd August, 1945 (Ex. D) been examined. The railway Shed Clerk Chowdhury states that S. N. Mukherjee, when he was depositing was a practising lawyer of the Alipore Court, where this case was being heard. H. P. Chatterjee was alleged to be ill and he did not know where Biswal was posted. Producing these papers and without examining the witnesses, who can speak from their personal knowledge leaves the Court to decide the case on such materials as have been produced. It was up to the Railway Administration to have produced before the Court not parts of evidence, but to present a complete picture, Ex. B and Ex. D conclusively show from the defendant's own papers that rain water was found within the wagon when it reached Champa and that a portion of the consignment had been damaged by such rain water. The Shed Clerk at Champa, who had been examined has been the clerk at Champa only for the last six months. He has no personal knowledge regarding unloading or delivery of the consignment in question. The other witness examined is a clerk of the Nepani Out Agency, who has proved the risk notes and spoken something about the condition in which the goods were booked at Nepani. They were booked in bags and although there is no record kept he alleges that he remembers that he examined this particular consignment, when they were booked. This seems to be rather unusual that apart from any records the Goods Clerk still remembers as to whether he had examined the contents of a particular consignment and also the contents of how many bags he had examined. Even if what he states from his memory be accepted that does not advance the case of the defendant.

12. The Manager of the plaintiff witness No. 2, for the plaintiff was present when the wagons were opened at Champa. The story which he wanted the Court to believe that 8 of the bags were never offered for delivery had not been accepted by us. With regard to the other part of the evidence about the condition in which the particular wagon in question reached the destination, we have the best evidence in Ext. B and D already referred to. To that extent this witness is supported by these Exhibits may be accepted. Additional observation is made by him as to how rain water had entered the wagon; he had noticed cracks in the ceiling and there were no locks or seals on the wagon. He is alleged to have brought to the notice of the railway staff that there were cracks and water marks on the wagon and accordingly a message was sent. That the message was sent appears from Ext. B. From the copy of the telegram it appears that the message had been sent to a large number of persons

to stations through which the wagons had passed as also to other officers, who deal with the claims for damage goods.

13. The case of the plaintiff is that the wagon was with a wooden roof and our attention had been drawn to Bisal's note on Ex. B to the effect that the wagon was marked W. T., i.e., wooden top. This Interpretation of the entries is not an unreasonable one and no other interpretation had been suggested. If the Railway Administration had produced the file relating to this matter and not merely Ex. B.....copy of the telegram, the train examiner's report called for from Bilaspur would have shown fully and satisfactorily the condition of the wagon. In the absence of any better evidence the case made by the plaintiff that the wagon was a defective one with a wooden top should be accepted. To carry a consignment of Biri leaves during the rainy season in August in such a condition cannot but be deemed to be a negligent act on the part of the Railway Administration.

14. The fact that the act accepted to be a negligent one is supported by the entry of the Claims Inspector, S. N. Mukherjee in the delivery book Ex. D. The Claims Inspector and the plaintiff's representative, who also signed the said entry that the extent of the damage in respect of the 50 bags was assessed at 62 1/2 per cent, support to a large extent the plaintiff's case. There is one circumstantial evidence which cannot be ignored. On behalf of defendants it was suggested that during heavy rains water might have percolated even through closed flap doors. Even if that part of the suggestion be acceptable that would not on the face of it explain the extent of the damage which had admittedly been the result of rain water entering the wagon. The capacity of the wagon was 100 bags and of those more than half, that is, 58 bags had been affected--8 almost completely and 50, on the assessment of the defendant Claims Inspector, to the extent of 62 1/2V per cent.--water percolating through the flap-door could not damage such a large portion of the consignment. The water which has entered the wagon through the crevices and through the flap-door would not get into the wagon to such an extent as to damage about 2/3rds of the total contents. It being admitted that the damage was occasioned by rain water inside the wagon the case as made by the plaintiff cannot but be accepted. Water coming through the top and not at one or two points only on the side be responsible for extensive percolation and that only could be the cause for such damage.

15. The conclusion which we have reached therefore on an analysis of the evidence is that out of the 100 bags carried in the particular wagon 8 bags were almost totally damaged and rotten and the major part of 50 bags had also been badly damaged by rain water getting into the wagon because of defects in the wagon itself. This was clearly an act of negligence on the part of the defendant.

16. The next question that arises is whether such negligence amounts to misconduct and also whether the plaintiff's claim can be resisted as they had been despatched under Risk Notes (A), (B) or (Z).

17. We proceed to consider the circumstances under which negligence would be taken to have been proved.

18. In the Bengal Nagpur Railway Co. v. Moolji Sicka & Co., (1) (35 C.W.N. 133), use of defective wagon was construed to be a case of negligence amounting to misconduct. In an earlier case B. N. Railway Co., Ltd. v. Moolji Sicka & Co., (2) (49 C.L.J. 551) use of wooden topped wagon during the monsoon was taken to be an act of negligence and such negligence was considered to be good evidence of misconduct. In Banwarilal Jagannath v. Bombay Baroda & Central India Ely, Co., (3) (61 C.L.J. 526) following certain English decisions a contrary view was taken : Proof of negligence is not proof of misconduct. In Ralliram Dingra v. The Governor-General of India in Council, (4) (48 C. W. N. 554), also it was observed that for proving misconduct the negligence must be of a graver character.

19. In Bengal Nagpur Railway Co., Ltd. v. Moolji Sicka & Co., (5) (54 C.L.J. 314), consignments packed upto the flap-door was accepted as a negligent act on the part of the Administration. In the Patna High Court also though in certain cases negligence was stated to be synonymous with misconduct [see Jamundas v. E. I. Rly., Co., (6) A. I. R. (1933) Pat. 630], there was authority holding a contrary view. See the Governor-General in Council v. Jamuna Das Agarwalla, (7) (1949) Pat. 119 : 27 Pat. 301].

20. In N. M. Roshan Umar Karim Co. v. M. & S.M. Rly. Co., Ltd., (8) (1936) Mad. 508 : 59 Mad. 789, the law as stated in B. N. Rly. Co. v. Moolji Sicka & Co., (1) (35 C.W.N. 133), was accepted as laying down the correct proposition and disapproving M. & S. M. Rly. Co., Ltd. v Sunderjee Kali-das, (9) (I.L.R. 60 Cal. 996).

21. It is no use multiplying instances. The correct approach is that whether there has been misconduct or not depends on the facts of each particular case. This view was expressed in G A. Jolli v. The Dominion of India, (10) (1949) Cal. 309 (388). On the facts of the present case the use of a wagon to carry tobacco leaves during the monsoon without taking necessary precautions is negligence of a grave character. That water entering into the wagon in large quantity due to a defective wagon must be deemed to be a case amounting to misconduct on the part of the railway authorities.

22. Keeping in view the conclusion reached above we now proceed to consider the effect of the execution of Risk Notes A, B or Z.

23. Risk Note A is to be used when. articles are tendered for carriage while either already in bad condition or, so badly packed as to be liable to damage, leakage or wastage in transit. In such a case the railway administration will be free from all responsibility for the condition in which the goods may be delivered at destination and for any loss arising from the same except upon proof that such loss arose from misconduct on the part of the railway servant. Having reached the conclusion that the railway servants were guilty of misconduct Risk Note A could not be used as a

shield against the claim for the loss or deterioration of the goods in question.

24. Risk Note B is used where the sender elects to despatch at a special reduced rate or owner's risk rate articles for which an alternative ordinary or risk acceptance rate is quoted in the Tariff. On behalf of the claimant it is contended that although this risk note is alleged to have been signed there are no two rates for the carriage of this particular commodity. There was a tussle between the claimant and the Government as to the manner in which this fact is to be proved. According to the claimant the negative can be proved only by an assertion thereof and it was possible only for the railway administration to produce before the Court the Tariff Rate Manual in force during the relevant period to show that there were different rates for the same commodity at owner's risk or otherwise. Such publications were placed before us during the hearing and our attention has not been drawn to the existence of separate rates. It is, however, contended on behalf of the railway administration that the risk note having been signed it would be operative and it is not necessary to enter into the question at this stage whether there were such separate rates. If a risk note is found to have been signed under a misapprehension and there is no basis for such an agreement it is open to the Court to proceed on that footing.

25. Even if, however, the risk note is to be enforced, a consignment is protected by the provision contained in the proviso in the said risk note. If one or more of the packages could not be delivered even though reached in accordance with the instructions laid down in the Tariff the administration is bound to disclose to the consignor how the consignment was throughout the time it was under their control. There are provisions how the burden shifts under certain circumstances. We are not satisfied that the packages were packed in contravention of any instruction laid down in the Tariff. The contents of the packages which were wholly rotten and were not possible to identify at the time of the delivery would not be covered by the provisions contained in this risk note.

26. We have considered above the fact of the risk note on the basis that such risk notes had actually been executed by the consignor. Evidence was led to prove that they had not been executed as alleged but that they were filled in blank, if they had been executed at all on behalf of the claimant. Some evidence was led on behalf of the plaintiff but two of the witnesses examined for the defendants proved execution though there are certain gaps in their evidence. We have decided on the interpretation on the risk note that plaintiff's claim cannot be resisted.

27. The result therefore is that the plaintiff's claim for damage to the 58 bags will have to be allowed. So far as 50 bags are concerned two notes by the Claims Inspector that it was accepted and that there was a damage to the extent of 62½ p. c. of the value of the contents. So far as the remaining 8 bags were concerned there was a total loss (Ex. D). No attempt has been made to resile from that position so far as the condition of the goods are concerned. About the weight of the defective

consignment also there is no dispute as it appears in Ex. D. About the marked rate the learned Subordinate Judge noted while dealing with the loss in respect of the other consignment which is not under appeal before us that there was no serious dispute as to the rate of price claimed. The plaintiff will accordingly be entitled at the rate claimed Rs. 2-6-0 per lb. in the case of the other lot.

28. This appeal is accordingly allowed" Judgment and decree passed by the lower court (so far as appertains to Invoice No. 1) are set aside and the plaintiff's claim in respect of the consignment described in item 3 of the Schedule to the plaint is decreed at Rs. 2-6-0 per lb. for the quantity mentioned there. The plaintiff will also be entitled to interest at 6 p. c. per annum from the date of the decree of the lower Court to the date of actual payment. We direct further that the plaintiff will be entitled to the cost of this Court, hearing fee being assessed at 10 G. Ms. and interest will run with the decretal amount from the date of the decree of the lower Court. We direct that the additional amount decreed by this Court be paid within two months of the date of signing the decree of this Court.

Renupada Mukherjee, J.

I agree.