Qadir Salamat Ullah vs Governor-General In Council And Anr. on 12 September, 1950

Equivalent citations: AIR1951ALL438, AIR 1951 ALLAHABAD 438

JUDGMENT

Mustaq Ahmad, J.

1. This is a plaintiff's appeal in a suit for recovery of Rs. 1513-4-0 as damages for loss of a part of the consignment sent by the plaintiff by the East Indian Railway. The consignment was made on 23-9-1913 from Unao (E. I. R.) to Mohammeda-Bad Gohna (O. T. R.). It consisted of three bales of cotton piece goods. On 2-10-1943, the consignment reached its destination, but when the plaintiff went to take delivery of the same he found two of the bales having been tampered with and some cloth pieces removed therefrom. On 7-10-1943, the plaintiff demanded 'open delivery' by a registered letter. Apparently, this was not allowed, and the demand was repeated by three other registered notices, the 1st dated 22nd October, the 2nd 15th November and the 3rd, 4th December, 1943. Eventually, after more than three months had elapsed from the arrival of the bales, the Railway Company did give an 'open delivery' to the plaintiff who made a note on the Delivery Book that there was a shortage. On these facts, the plaintiff claimed the amount already mentioned, which consisted of four items: (l) Rs. 352-4-0 for the goods missing. (2) Rs. 44/- as profits, (3) Rs. 700/- as loss due to fall in the price after the defendants' failure to deliver the goods and (4) Rs. 417/- as 'presumptive' profits, total Rs. 1513-4-0.

2. The defendant companies pleaded in defence that the consignment having been booked under the Risk Note Form A and no loss having occurred due to their negligence, the plaintiff was not entitled to any damages. They further pleaded that one of the bales had been loosely packed and the other two were "slack" without water-proof, all of them being wet at the time of weighment when consigned, It was further averred that the covering was weak and it had consequently got worn out during transit and that the shortage was due to the goods getting dried, there having been possibly some leakage due to loose packing and weak covering. The trial Court found that two of the bales had been tampered with and cloth had been removed therefrom, while they were in the defendants' possession. It also found that the loss was due to the misconduct of the Railway Companies. On these findings it passed a decree for Rs. 687-1-0, that is Rs. 352-4-0, on the first count, and Rs. 334-13-0, on the third.

3. On appeal by the defendants, the lower appellate Court dismissed the entire suit on the finding that the plaintiff had failed to discharge the onus of proving that the loss was due to the negligence of the Railways. This finding was based on the learned Judge having enforced the provisions of the Risk Note Form A against the plaintiff. There was a further finding by him that the plaintiff was not entitled to any damages on account of delay in delivery, as the defendants had never refused to allow

the same. 4. Learned counsel for the plaintiff-appellant has strenuously argued that the lower appellate Court erred in applying the provisions of Risk Note, Form A in the present case. That form provides :

> "I the undersigned do hereby agree and undertake to hold the said railway administration over whose railway the said goods may be carried in transit harmless and free from all responsibility for the condition in which the aforesaid goods may be delivered ..... to the consignee at destination and for any loss arising from misconduct on the part of the Railway administration's servants."

5. As just mentioned, the lower appellate Court, relying on the concluding portion of this Note, placed the burden on the plaintiff of proving that the loss in this case had been due to the misconduct of the Railways' servants and, holding that the plaintiff had failed to discharge that onus, it dismissed the entire suit. A critical examination of the provisions of this Note would, in my opinion, tend to take the present case entirely out of its scope. What has to be noticed in this document is that the complaint of the plaintiff claiming damages must have reference to the "condition" in which the goods have arrived, that the loss thereby suffered by the plaintiff must have originated directly from that condition and that it is in respect of such loss that the burden is on the plaintiff to prove the same being due to the misconduct of the Railway servants. Where, therefore, there is a shortage in the quantity of the goods arrived or there is a loss of a complete package or complete packages, it would not be a case covered by this Risk Note, Form A at all, for the simple reason that it cannot be said that the "goods" have arrived or the "goods" have been delivered at the destination point. The Risk Note would obviously apply to cases and only to such cases where the plaintiff has suffered some monetary loss due to some deterioration in the condition of the goods and not to a cutting away of a portion of the goods owing to theft or pilferage. In the latter case, there would be no question of any loss due to a deteriorated condition. It would be a loss due to an actual disappearance of a portion of the goods, and this would hardly be consistent with the "goods" having arrived or haying been delivered.

6. This interpretation of the Risk Note Form A does not appear to have entered into the consideration of the lower appellate Court at all. That Court apparently assumed that the plaintiff's allegation of a loss was one with reference to the 'condition' in which the goods had arrived. It was in fact nothing of the kind. He had nothing to say against the condition in which the goods had arrived or the consequent monetary loss which had accrued to him. His case, was one of a virtual reduction in the quantity of the consignment when it had arrived, that having nothing to do with the point of the "condition" in which it bad arrived, nor bad it any reference to any monetary or pecuniary loss which the plaintiff alleged having incurred as due to a deterioration in that condition. As we know, the plaintiff's case was that a portion of the contents of each of two out of the three bales had been actually removed, thereby involving a reduction of the weight of the bales and also necessarily of their market value. All this obviously had nothing to do with the conception of the word "condition" mentioned in the Risk Note. The lower appellate Court, unmindful of this position and without applying its mind to the context in which the relevant words in this Form had been used by the Legislature, simply assumed that the plaintiff having executed the form had taken upon himself the burden of proving that the loss was due to the misconduct of the Railway servants before he could be

entitled to any damages from the Railway Companies in Governor-General of India in Council v. Firm Bishundayal Ram Gaurishankar, A. I. R. (35) 1948 Pat. 48 which also was a case of the Risk Note Form A, it was observed :

> "The Risk Note A has no application at all to cases of failure to deliver, or pilferage, because a thing never delivered cannot be said to have been delivered in any condition, and, therefore, no question arises of any loss arising from the condition in which the goods were found on delivery."

Again, in B. N. W. Rly. Co. v. Firm Dassundhi Mal Bishambar Das, A. I. R. (15) 1928 Lah. 166: (108 I. C. 177), it was held that:

> "Risk Note A confers exemption from liability only in respect of the 'condition' of the goods at the time of the delivery at destination. It cannot confer immunity from liability for loss due to other causes, e.g., loss due to fall in prices resulting from undue delay in transit, or loss due to disappearance of goods due to theft, etc." The Bench delivering the judgment had followed a decision of this Court in B. N. W. Rly. Co. v. Munna Lal Bishambhar Nath, 46 ALL. 814: (A. I. R. (11) 1924 ALL. 760) which also was a case of the Risk Note Form A. In Governor-General in Council v. Gopali, A. I. R. (31) 1944 Oudh 81: (213 I. C. 7) also it was held that:
>
> "The Risk Note above referred to (Form A) does not by its terms absolve the defendants in respect of their liability for the loss of a part of the consignment."

7. The lower appellate Court relied on a Single Judge decision of this Court in Secretary of State v. Rup Ram Audh Behari, A.I.R. (18) 1931 ALL 135 which undoubtedly was a case of same goods missing out of bales consigned. It would be enough to say that the distinction which I have drawn between the present case and cases truly covered by the Risk-note Form A, which distinction was also clearly emphasised in the rulings I have referred to above, was not considered by the learned Judge in this case at all. I am, therefore, definitely of the opinion that the concensus of authority is in favour of the view I have expressed on the point. Accordingly, I hold that the Risk Note executed by the plaintiff in this case has no application at all in determining the liability of the defendant Companies in respect of the claim preferred.

8. Eliminating this hurdle from the way of the plaintiff, the position, so far as the said liability is concerned, becomes simple enough. Section 72, Railways Act, provides:

> "The responsibility of a railway administration for the loss, destruction or deterioration of animals or goods delivered to the administration to be carried by railway shall, subject to the other provisions of this Act, be that of a bailee under Sections 151, 152 and 161, Contract Act, 1872."

No doubt Sub-section (2) restricts this responsibility where there has been an agreement purporting to limit the same and reduced to writing, signed by or on behalf of the person sending or delivering

to the railway administration the animals or goods, and is otherwise in a form approved by the Government. The form in this case was Risk Note Form A, which, I have already held, had no application to this case at all. The restriction which would thus have limited the responsibility of the railway administration did not come to affect the position in this case in the least, and the general provisions contained in Sub-section (1) of this section remained unaffected. Section 151, Contract Act, enjoins that in all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.

9. In the present case admittedly the goods arrived in a damaged condition. There is no suggestion by the defendants that the goods, even when consigned from Unao, were in the same quantity or of the same value as those found when they arrived at the place of destination. Indeed, it is admitted that there was a removal of a portion of the contents of two of the bales. This happened when the goods were in the possession of the Railway Companies and under the control of their servants. Applying the normal rule as embodied in Section 106, Evidence Act, it was only the Railway Companies which could have special knowledge of the manner in which the goods got missing in transit: the consignor, the plaintiff in this case, could possibly have no inkling, either of the place where, or the manner in which, this had happened, the Railway Companies being the only persons able to throw light on the same. The defendants in this case kept significantly silent so far as that matter was concerned. They produced only a single witness, the Goods Clerk, to whom the consignment had been entrusted for despatch at Unao. The plaintiff, on the other hand, examined a number of witnesses deposing to the actual condition in which the goods had arrived. Even if the burden lay on the plaintiff, and I have already held that it did not lie on him, of proving the loss being due to the misconduct of the Railway administration, such an inference could be legitimately drawn from the admitted fasts which I have just mentioned. Of course, the lower appellate Court got over the point simply by holding that the plaintiff, in spite of having executed a Risk Note Form A had not discharged the onus of proving the loss being due to the misconduct of the Railway administration. I have already said that there was no such burden on him, and I also affirm that, whether there was any such burden or not, even the admitted facts proved to the hilt that the servants of the defendant-Companies had been guilty of misconduct in causing a loss to the plaintiff in this case.

10. The lower appellate Court then held that there was no refusal to give delivery by the defendants. I have already mentioned that for over three months there was no willingness to allow an open delivery for which the plaintiff had persistently requested the defendants through successive registered notices. That the defendants did eventually give such delivery shows that they had no justification in refusing it at the outset when the plaintiff had first demanded it. Now it could in such a case be conceived that there was no refusal on the part of the defendants to give such delivery, I cannot tell. I should think that, in the circumstances, it was impossible to hold that the defendants had not refused to allow open delivery to the plaintiff, thereby protecting themselves against a demand for damages to be made by the owner of the goods. On this point also, I am unable to agree with the learned Judge.

11. On these considerations. I have come to the conclusion that this appeal must be allowed. Accordingly, I allow the appeal, set aside the decree of the lower appellate Court and restore that of the Court of first instance with costs to the plaintiff throughout.