The Banarsi Stores vs President Of The Union Of Indian ... on 26 November, 1952

Equivalent citations: AIR1953ALL318, AIR 1953 ALLAHABAD 318

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Bench: V. Bhargava

JUDGMENT

Chaturvedi, J.

1. This is a plaintiff's appeal arising out of a suit for the recovery of Rs. 16,220-14-6.

2. The plaintiff despatched 43 silk saris from Kashi railway station to Howrah railway station on 5-10-1945. The plaintiff was the consignor as well as the consignee. The saries were loaded in a passenger train known as the 14 Down Upper India Express, and a partner of the plaintiff's firm, by name Raghunath Prasad, went in the same train by which the saris were despatched. This parcel was found missing at Howrah and was not delivered to Raghunath Prasad at Howrah after the arrival of the train at that station. There was a lengthy correspondence after this but the parcel was not delivered at all. Hence the suit.

3. The plaintiff claimed us. 14,278-1-3 as price of the 43 saris despatched by him, RS. 1,289-11-3 as interest on the above amount at Rs. 9 per cent. and RS. 653-9-3 as expenses incurred in coming and going to Calcutta in connection with the steps taken for obtaining delivery of the saris.

4. The plaintiff's case was that the saris were not of a description which required to be declared and insured according to the provisions of Section 75, Railways Act, and the suit was based on nondelivery of the parcel containing these saris. The plaintiff did not admit that the parcel had been lost to the railway administration and the prayers contained in the plaint were that the missing parcel with its contents be ordered to be delivered to the plaintiff, and in the alternative, a decree be passed in its favour for the recovery of the price of the saris with interest and incidental charges as mentioned above.

5. The main defence to the suit were that the consignment in suit consisted of silk saris with and without gold or silver thread-work of the value of more than Rs. 100; and should, therefore, have been declared and insured as provided by Section 75, Railways Act. It was alleged that the plaintiff did not declare the value, nor paid the insurance charges; on the other hand, he executed a risk note in Form X exonerating the railway administration of all responsibility for the loss of the consignment. It was further pleaded that the consignment had been lost in spite of the best efforts

and vigilance of the railway staff which was not negligent or careless. The value of the consignment, as alleged by the plaintiff, was said to be exaggerated.

6. The learned 1st Additional Civil Judge of Banaras who tried the suit framed altogether sis issues in the case, but the issues which are material for the purposes of this appeal are the first three issues framed by him. These three issues are as follows :

> 1. Whether the consignment in suit consisted of goods excepted within the meaning of Section 75, Railways Act; if so, what is its effect ?
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> 2. Whether the goods in dispute were consigned with the defendant in risk-note form x; if so, what is its effect ?
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> 3. Whether the consignment in suit was not delivered to the plaintiff on account of gross negligence and misconduct of the defendants or waa the same lost as alleged by the defendants?

7. On the first issue the learned Civil Judge held that the goods consigned consisted of pure silk saries with or without gold or silver thread-work and they were not artificial silk or imitation thread the goods were itself of a description which required to be declared and insured under Section 75, Railways Act. The findings of the learned Civil Judge on issue 2 were that Radhey Lal, a partner of the plaintiff's firm did execute risk note Form x. In the third issue the learned Civil Judge found that Radhey Lal did declare the value of the goods to the clerk concerned but he did not agree to pay the insurance charges : that the parcel in dispute was lost between Moghal Sarai and Burdwan and was no longer in the custody of the railway administration. the defendant, therefore, was not liable to the plaintiff for the payment of the price of the articles consigned. The learned Civil Judge went on to hold that, if the defendant had been held liable to pay the value of the consignment, the Civil Judge would have decreed the entire claim, because the value of the saris had been proved to be as alleged by the plaintiff in the plaint. In the end the learned Civil Judge dismissed the suit with costs, on the finding that the defendant was protected by the provisions of Section 75, Railways Act.

8. The learned counsel for the appellant has argued that the goods were not of a description which required to be declared and insured under Section 75, Railways Act; that in any case, even if they were so required to be declared and insured, the plaintiff had declared the value of the goods and it was not proved that Radhey Lal had ever executed the risk note Form x; that the goods have not been proved to be lost to the railway administration; and that the loss, if any, was caused by the theft or misappropriation by the servants of the railway administration.

9. We propose to deal with the last point first, as in our opinion, the question does not arise in a case which is covered by Section 75, Railways Act, and in which a risk note in Form x has been duly executed. Section 75, Railways Act, was amended once in the year 1947 when the words "Rs. 300" were substituted for the words "RS. 100" and again in the year 1949 when more substantial amendments were made in the section. As stated above, the goods were consigned on 5-10-1915 and the present suit was instituted on 1-10-1946. We shall, therefore, have to ignore the amendments

mentioned above and have to decide the case on the section, as it stood before the amendments of 1947 and 1949. Before these amendments Section 75, Railways Act, stood as follows :

> "75 (1) When any articles mentioned in Schedule 2 are contained in any parcel or package delivered to a railway administration for carriage by railway, and the value of such articles in the parcel or package exceeds one hundred rupees, the railway administration shall not be responsible for the loss, destruction or deterioration of the parcel or package unless the person sending or delivering the parcel or package to the administration caused its value and contents to be declared or declared them at the time of the delivery of the parcel or package for carriage by railway, and, if so required by the administration, paid or engaged to pay a percentage on the value so declared by way of compensation for increased risk.
>
> (2) ....., (3) .... ."

10. the section clearly provides that the railway administration would not be responsible for the loss, destruction or deterioration of the parcel unless the person sending the parcel had declared the value of the goods at the time of the delivery of the parcel for carriage by railway and had paid for engaged to pay a percentage on the value so declared, if required to do so by the administration. Unless both these conditions were complied with, no responsibility attached to the railway administration for the loss of the parcel; and it did not matter in what way this loss was caused. In the case of the class of goods mentioned in Schedule 2 the value of which exceeded one hundred rupees the railway administration would naturally take extra care and were entitled to be paid additional charges. If the plaintiff elected not to fulfil both the conditions, he took the risk of the parcel being lost; and the section nowhere provides that under such circumstances the railway administration would be responsible for making good the loss in case it was caused by misconduct or theft by servants of the railway. We have, therefore, to consider in this appeal whether the plaintiff had declared the goods, and whether he was required by the railway administration to pay an additional charge and had refused to do so. We have further to see whether the goods were of a description as mentioned in sch. 2 attached to the Railways Act. We have also to see whether the goods have been lost not only to the plaintiff but also to the railway administration.

11. We propose to decide these points in the order in which they were argued by the learned counsel for the appellant.

12. The first contention of the learned counsel for the appellant was that the saris were made of artificial silk and were wrought up with imitation gold or silver thread. They were not thus of the description given at items (a), (c) or (1) of sch. 2 of the Railways Act. On these points the plaintiff has produced one of his partners, Radhey Lal, and another partner, Raghunath Prasad, and another silk merchant Bhola Nath, the munim of the plaintiff firm, Daya Shankar, and three weavers, by name Asghar Husain, Mohammad Umar and Abdul Rauf.

13-14. Before considering the oral evidence produced by the plaintiff on the point, we propose to consider the documentary evidence first. (After discussing this evidence his Lordship proceeded): In

view of the facts mentioned, we agree with the learned Judge in his conclusion that Banarsi silk is genuine silk, and the saris despatched under the parcel were made of Banarsi silk, as the documentary evidence mentioned above fully establishes. In view of the said documentry evidence, and the admitted fact that the cloth known as Banarsi silk is not artificial silk, we have no hesitation in disbelieving the witnesses produced by the plaintiff on this point. As stated above, the parcel, therefore, was of a description mentioned at item (1) of Schedule 2 of the Railways Act.

15. The next point that arises for consideration is whether the plaintiff had declared the value of the goods at the time of the delivery of the parcel for carriage by the railway. (His Lordship considered the evidence and proceeded) :

> In this state of evidence, we are of the opinion that it has not been proved that Radhey Lal declared the value of the parcel. The learned Civil Judge has held it to be proved that the value of the parcel has been declared by Radhey Lal; and for this finding, he has mainly relied on the fact that the risk note in form x had been executed and the execution of this risk note pointed to the conclusion that the value must have been declared. We find ourselves unable to agree with the learned Civil Judge on this point, because everybody could have known that the value of the goods contained in the parcel was more than Rs. 100; and this being the value, the necessity of the execution of the risk-note immediately arose. The execution of this risk-note was denied by Radhey Lal, but we have considered the above point on the assumption that Radhey Lal had actually executed the risk-note; as we are of the opinion that it had been proved that Radhey Lal did execute the risk-note EX. A5.

16. This risk-note has actually been produced in Court by the defendant and it is difficult to believe that the defendant or any servant of the defendant would go to the length of forging Radhey Lal's signature on the risk-note. (His Lordship considered the evidence on the question of proof of the risk-note and continued): The evidence mentioned above leaves no room for doubt that the risk-note was executed by Radhey Lal at the time when he tendered the parcel to the parcel clerk at Kashi Railway Station, and we agree with the learned Civil Judge on his finding on this point.

17. The plaintiff has produced a handwriting expert, Mr. M.M. Sen Gupta, to prove that the signatures on the risk-note are not those of Radhey Lal. The learned Civil Judge has not placed any reliance on the statement of this witness, because he was of the opinion that the opinion of this witness was likely to be prejudiced in favour of the party who had paid him and summoned him to appear as a witness. The opinion of a handwriting expert is seldom conclusive and the same is the position as far as the opinion of Mr. Sen Gupta in the present case is concerned. The documentary evidence to prove that Radhey Lal had executed the risk-note is overwhelming, and, under the circumstances, no importance can be attached to the opinion of this handwriting expert in the present case.

18. The next point argued by the learned counsel for the appellant is that the plaintiff would still be entitled to a decree unless the defendant proved that the parcel had been lost to the railway administration. His contention is that Section 75, Railways Act, absolves the defendant from liability

only in case it is proved that the parcel has been lost not only to the plaintiff but also to the railway administration. In support of this proposition the learned counsel cited three cases reported in Governor-General-in-Council v. Debi Sahai, 1945 ALL. L. J. 543, Governor-General-in-Council v. Mohammad Badr-i-alam, A. I. R. 1949 ALL. 223 and Governor-General-in-Council v. Mahabir Ram, 1952 ALL. L. J, 443 (F. b.). The first case mentioned above is a Division Bench case of this Court and it fully bears out the contention of the appellant's counsel on the point; and the last case is a Full Bench case of this Court, and it clearly lays down that the word 'loss' as used in Section 77 means loss to the railway administration. We respectfully agree with the propositions of law laid down in the first and the last case mentioned above. But in the second case certain observations have been made by a learned Single Judge with which with the greatest respect, we find ourselves unable to agree. The learned Single Judge lays down :

> "Where, for instance, the goods were lying in a goclown of a railway somewhere on the line or have been deliberately removed or stolen by some employee of the railway, that would not be a case of a 'loss' by the railway company. Surely the railway company would not be deemed to 'lose' what a servant of the company is all the time keeping for his own enjoyment."

We have no difficulty in agreeing with the learned Judge that, if the goods were lying in a godown of a railway somewhere on the line, it could not be said that the goods had been lost to the railway administration. They are then really in the possession of the railway and have certainly not been lost to the railway administration. But when the learned Judge goes on to say that, if the goods were removed or stolen by some employee of the railway and such employee was keeping the goods for his own enjoyment, even then the railway would not be said to have lost the goods, we think the learned Judge has gone too far. If the railway servant has deliberately removed the goods and is keeping them at his house for his own enjoyment, the possession of the goods is no longer with the railway administration; but it has transferred to the employee who has removed the goods. On the question whether the master or the servant is in possession of the goods, the element of intention of the servant, who may be in actual possession, is the determining factor, If the servant is keeping the goods with himself for his own use or has removed them for that purpose, the possession has immediately been transferred from the master to the servant. If it were otherwise, there would hardly be a case of theft of the master's goods by a servant. We are, therefore, of the opinion that, if the parcel is not in the possession of the railway administration but has been removed by some servant of the railway dishonestly for his personal gain, the parcel must be taken to be lost to the railway administration.

19. In this view of the matter, it is not necessary to decide whether the loss has been occasioned by a theft or misappropriation by a railway servant or by somebody else. If the parcel is proved to be no longer in the possession of the railway administration, we must take it to be established that the parcel has been lost to the said administration.

20. We have, therefore, to consider whether it has been proved by the defendant that the parcel in question has been lost to it. The loss of this parcel was to be proved by the defendant, and to prove the loss, the defendant has produced two guards, by name Ram Shankar and B.T. Ojha; an assistant

luggage and parcel supervisor at How rah by name N.K. Mitter, and a clerk in the Chief Commercial Manager's office, Calcutta, by name K.P. Rai Chaudhari. (His Lordship went through their evidence and proceeded :) The learned counsel for the appellant argued that the defendant should have produced all the letters that were written to the different station masters and their replies to those letters; and that the defendant should have appointed somebody to go to every railway station and to look into every parcel office to find out the parcel. We do not agree with this contention of the learned counsel, and we think that it would be laying too heavy a burden on the railway administration to require them to positively prove that every parcel office of every station has been thoroughly searched; and, probably, every other building belonging to the railway administration has laso been searched for each individual parcel; and the person or persons who have made the search should come to Court and state these facts; and it is only then that the Courts can possibly hold that a parcel has been lost to the railway administration. It is true that the burden of proving loss of the parcel to the railway administration lies on the administration, but when parties have entered into evidence, it is for the Courts to decide on that evidence as to whether the parcel has been proved to have been lost or not. In this connection, we may point out that the Upper India Express becomes a passenger train from Moghal Sarai to Howrah and there must have been hundreds of railway stations where the train must have stopped while running from Moghal Sarai to Howrah.

21. We think that it was quite sufficient for the railway authorities to have made enquiries from every station master on the line, and it was not at all necessary that a man should have been deputed for looking into the parcel office of every railway station for every parcel, and then, come to make statement in Court that he has personally looked into every parcel office of all intermediate stations but the parcel was not found at any one of them. This was not a case where there was any transhipment of goods at any intermediate station; it was the same train which went from Kashi up to Howrah. It is proved that the parcel was loaded at Kashi and it is proved that it was not available at Howrah, and, to avoid a remote possibility of the parcel having been taken out by mistake at anyone of the intermediate stations, inquiries were made from all the station masters. In our opinion, this was quite sufficient to prove that the parcel has been lost to the railway administration; and we agree with the Court below on its finding on this point.

22. There is a possibility that the parcel may have been misappropriated by some of the railway servants, but there is no doubt that, as far as the railway administration is concerned, the parcel has been lost to them. On these facts, the railway administration is fully protected by the provisions of Section 75, Railways Act, and by risk-note in form x which embodies a special contract between the parties.

23. We, therefore, confirm the decree passed by the learned Civil Judge and dismiss this appeal with costs.