

Uttam Singh Kala Singh And Ors. vs Union Of India And Ors. on 6 May, 1970

Equivalent citations: AIR1971DELHI79, ILR1970DELHI561, AIR 1971 DELHI 79

JUDGMENT

1. The appeal is directed against the judgment and decree dated December 17, 1959 of the Subordinate Judge 1st Class, Delhi, dismissing suit No. 325/86 of 1957/59 but leaving the parties to bear their respective costs. The suit was filed by the three appellants who are billion merchants in Delhi against the Union of India through the General Manager of the Western, Central and Northern Railways.
2. The suit was to recover Rs. 80,000/- as compensation for non-delivery of a parcel containing 750 tolas of gold bullion merchants of Bombay, some time in August, 1956 to Delhi. Each of the three appellants had placed separate orders with the said Bombay firm for supply of 250 tolas of gold but the said Bombay firm dispatched the entire quantity in one parcel. The claim of Rs. 80,000 was made up as follows:- (a) Value of gold Rs.77,000/- (b) Amount of interest Rs. 3,600/- (c) Refund of freight Rs. 18/8/ Total Rs.80,618/8/-

Out of the amount, the claim of Rs. 618/8/- was relinquished. In addition to the said amount, the appellants prayed for interest at the rate of 6 percent per annum on the decretal amount from the date of suit till payment or realisation. The suit was filed on July 3, 1957 after serving upon the respondents notices under Section 77 of the Indian Railways Act, hereinafter referred to as "the Act" and Section 80 of the Code of Civil Procedure.

3. The case of the appellants was that the aforesaid parcel was entrusted to the Parcel Clerk, Western Railway, Bombay Central, for carriage by rail to Delhi for delivery to appellant No. 1 on behalf of all the appellants under parcel Way Bill BCT/1 No. 43340 dated 30-8-1956 (Ex. P. 1) which was issued after Hari Das (P.W. 3) a representative of the said Bombay firm, had executed the forwarding note (Ex. D.1) wherein he had declared that the said parcel contained gold of the value of Rs.77,000/-. The appellants alleged that the spite of demands the respondent had failed to deliver the said consignment of gold and since the respondent had not explained the cause of non-delivery, there was a presumption of misconduct on its part and on the part of its employees entitling the appellants to claim the suit amount.

4. In the written statement filed by the respondent, the acceptance of the gold parcel and its non-delivery were not disputed. It was alleged that at the time of booking of the said parcel, the representative of the said Bombay firm had asked by the Assistant Luggage Clerk on duty whether the parcel was to be insured but on being told that it was not to be insured, it was booked at owner's Risk rate and an endorsement was made on the said parcel Way Bill describing the contents of the said parcel as 'lone case said to contain gold valued Rs.77,000 was not insured and at owner's Risk.' The respondent further alleged that the parcel of gold had been lost as a result of a running train

theft and, by reason of section 75 of the Act, the respondent had not incurred any liability. The facts relating to the alleged theft were given in the additional pleas to the written statement. In the replication, the appellants reasserted what they had said in the plaint and denied, for want of knowledge, the facts relating to the alleged theft stated in the additional pleas to the written statement. The appellants further alleged that the gold having been placed in the custody of the railway administration, it must be presumed to be in possession of the sand and was liable to deliver the same to the appellants or to pay compensation as claimed in the plaint.

5. Upon the pleadings of the parties, the Subordinate Judge framed the following issues:-

1. Whether the plaintiff No. 1 is a registered firm and Shri Kala Singh its registered partner?
2. Whether the plaintiff No. 2 is a registered firm and Shri Kherati Lal its registered partner?
3. Whether Shri Ratan Chand is the sole proprietor of plaintiff No. 3?
4. Whether the plaintiffs or any of them had locus standi to file the present suit? (Onus objected).
5. Whether it was not necessary for the defendant to ask the consignor or his representatives, if he desired to insure the suit consignment?
6. If issue No. 5 is not proved, whether the railway administration asked the sender or his representative to pay or engage to pay in writing percentage on the value declared by way of compensation for increased risk?
7. If issue No. 6 is proved, whether the consignor complied with this requirement? If not, its effect?
8. Whether the consignment in suit was booked on the railway risk rate?
9. Whether the non-delivery amounts to negligence and misconduct on the part of the railway administration (O.P.P)
10. If issues Nos. 8 and 9 are not proved, whether non-delivery was due to the negligence or misconduct on the part of the railway administration?
11. If issues Nos. 8 and 9 are proved, whether the railway administration is not guilty of negligence and misconduct?
12. Whether the goods in suit were lost in the running train theft, if so, its effect?

13. To what amount, if any, is the plaintiff entitled.

14. Relief.

Issues Nos. 1 to 4 were decided in favor of the appellants and the findings on these issues have not been challenged before us. The learned Subordinate Judge then dealt with Issues Nos. 5, 6, 7 and 12 together and held:-

(1) "that it was necessary for the railway administration to require the sender to pay the percentage on the value of this gold if it was its intention to exempt itself from the general liability as a carrier";

(2) "that the requirement of Section 75 of the Railways Act regarding payment of percentage charge on the declared value of the gold in question was fully complied with by the railway through the forwarding note executed by the sender and the parcel way bill issued in the favor by the booking clerk";

(3) that "it was never the intention of the sender to pay the percentage charge and in fact he never paid any nor did he enter into any engagement to pay the same";

(4) that the parcel was in all probability "stolen from the running train between Bombay Central and Ratlam. The possibility of its removal by one of the railway servants or by some one with the connivance of the railway servants at Bombay Central cannot be definitely ruled out. The theft in the running train, if it was not by the railway servants themselves, was certainly facilitated by the negligence of the railway staff and especially of Damodar G. Pandey: and (5) that the gold parcel had been lost to the railway.

6. On issues No. 8 to 11 the learned Subordinate Judge held that the parcel had not been sent at railway risk rate; that non-delivery was not due to negligence and misconduct on the part of the railway administration; that the parcel had been lost to the railway and that Damodar G. Pandey, the Insurance Guard on the train on which the parcel was carried, along with some other railway servants had been negligent in handling the parcel in the course of conveyance. In spite of this finding that the said parcel had been lost to the railway within the meaning of Section 75 of the Act, the learned Subordinate Judge dismissed the suit.

7. The contentions of the appellants in the appeal before us are that no individual demand was made by the railway administration for payment of insurance charges as required by Section 75 of the Act in respect of the said parcel; that the respondent had not proved loss of the consignment and that there cannot be any question of loss where the very official of the railway to whose custody the parcel was entrusted had misappropriated it or had arranged its disappearance. The allegation is directed against Damodar G. Pandey, the Insurance Guard on the train in question.

8. Section 75 of the Act makes provisions with respect to the liability of the railway administration as a carrier of articles of special value. These articles are specified in the second schedule. Gold is one of such articles. This section says:-

"(1) When any articles mentioned in the Second Schedule 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 three 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 in writing or declared them in writing 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 in writing a percentage on the value so declared by way of compensation for increased risk.

(2) When any parcel or package of which the value has been declared under sub-section (1) has been lost or destroyed or has deteriorated, the compensation recoverable in respect of such loss, destruction or deterioration shall not exceed the value so declared.

(3) A Railway Administration may make it a condition of carrying a parcel declared to contain any article mentioned in the Second Schedule that a railway servant authorised in this behalf has been satisfied by examination or otherwise that the parcel actually contains the article declared to be therein."

Sub-section (1) imposes an obligation upon the consignor sending or delivering the parcel containing an article of special value to cause, its value and contents to be declared in writing either beforehand or at the time of the delivery of the parcel for carriage by railway. Upon such declaration being made, the consignor has to pay or engage to pay in writing a percentage on the value so declared by way of compensation or increased risk, if so required by the administration. It is, therefore, clear that such percentage need not be paid if the railway administration does not require it to be paid in spite of a declaration of value. The case of the appellants is that no such demand was made by the railway administration in respect of the parcel in question. The case of the respondent firstly is that such a demand was in fact made by the luggage clerk, Nanawati (C. W. 2) at Bombay Central and secondly that the demand or requirement of payment of percentage charge is contained in the second explanatory note to the forwarding note (Ex. D.1) which had been executed by a representative of the said Bombay firm.

9. On the question of an actual demand Nanawati (C. W. 2) has stated that he enquired from the sender's representative if he wanted to get the parcel insured and that the reply was in the negative. He has further stated that it was not his duty to enquire from the consignor's representative whether he wanted to get the parcel insured or not because there was some other clerk who was acting as an Insurance Clerk. As against this evidence, the appellants have produced Hari Das (P.W. 3) to have presented the parcel at Bombay Central Railway Station. He has stated that none of the officials or

the booking clerks to whom he tendered the said parcel for carriage asked him or required him to pay a percentage charge on the amount declared by him as the value of gold. At the same time Hari Dass admits that the parcel clerk had asked him if the gold had been insured. The explanation of Hari Dass that this insurance did not refer to the percentage charge leviable render this section does not carry conviction in view of his further admission that he had previously been insuring gold parcels. The learned Subordinate Judge has weighted the evidence of these two witnesses and come to the conclusion that the parcel clerk had asked Hari Das to insure it. We have been taken through the evidence of these two witnesses but nothing has been shown to us to persuade us to differ from the findings of the learned Subordinate Judge on this question and we affirm the finding that Nanawati, the Parcel Clerk, had required Hari Das to pay the percentage charge under Section 75 of the Act.

10. The second contention of the respondent as stated earlier is that an individual demand is not necessary as the demand or requirement has been incorporated in explanatory note No. 2 in the forwarding note which is to the following effect:- "Railways are not responsible for any loss, destruction or deterioration of or damage to a parcel or package containing any article (s) specified in the second schedule to the Indian Railways Act IX of 1890 whose value exceeds Rs.300/- per parcel or package unless the contents and value are declared and an engagement entered in to pay the authorised percentage on value charge, if required. The declaration of contents and value must be made in Clause (2) overleaf and the word "engage" or the words "do not engage" struck out according to whether consignment is to be booked by the Railway with bailee's responsibility or otherwise. The administration hereby give notice that payment of percentage on value charge is required."

The last sentence in this note clearly contains a general notice that payment of percentage on value charge is required. By this notice the railway administration appears to insist upon payment and even an engagement to pay in writing permitted by Section 75 (1) is excluded. Section 54 of the Act authorises a railway administration to impose conditions with respect to the receiving, forwarding or delivering of any animals or goods. Such conditions are to be kept at the railway station and are open to inspection free of charge by any person at all reasonable times. This section, therefore, is in the nature of a statutory notice that the railway administration may impose certain conditions for the receiving, forwarding or delivering of any animals and goods. In pursuance of the powers conferred by this section, the railway administration issues general rules which are known as Coaching Tariff. Rule 210 of Cochin Tariff No. 16 defines the term "Treasure" as including gold. It further provides that when a parcel contains treasure, a full description of the contents must be declared in writing at the time of booking and also be given in the Parcel Way Bills and luggage tickets. Rule 226 of the Coaching Tariff contains a notice that when any treasure is contained in any parcel or package delivered for carriage by railway of the value of more than Rs. 300/- the railway administration shall not be responsible for the loss, destruction or deterioration of the parcel unless the person sending or delivering the parcel causes its value and contents to be declared at or before the time of delivery of carriage and unless a percentage charge on value over and above the freight charges at railway risk is paid to and accepted by some person duly authorised to receive the same on behalf of the railway. It is further notified that percentage charge on value must in all cases be prepaid. The prepayment is further emphasised in R. 227 of the Coaching Tariff and Rule 228 of

the Coaching Tariff specifies the rate of charge. In addition to this, the railway administration issued a circular to this effect which is printed at page 329 of the paper-book. There can, therefore, be no doubt that in exercise of its powers under Section 54 of the Act, the railway administration has not only given a notice of its non-liability for carriage of treasure unless a percentage charge is paid but also that such percentage charge must be prepaid at the rates specified. The notice contained in the aforesaid rules in the Coaching Tariff is pointedly brought to the attention of the consignor by the second explanatory note in the forwarding note which as to be filled in and completed by the consignor himself. In our opinion, such a general notice is in compliance with Section 75 of the Act and upon a construction of this section, we cannot accept the contention on behalf of the appellants that an individual demand must be made by the railway administration when a parcel containing treasure is tendered for carriage by railway.

11. Then the question is as to the liability of the railway administration as a carrier of articles of special value as provided by Section 75 of the Act. There is no doubt that if the percentage charge required has been paid by the consignor in respect of an article of special value under Section 75 of the Act and the Coaching Tariff the railway administration will be responsible for the loss, destruction or deterioration of the parcel to the extent of the declared value in the same way as a bailee would be liable under Section 152 and 161 of the Indian Contract Act, 1872. The question, however, is as to whether the railway administration is similarly liable for such loss, destruction or deterioration of a parcel containing any article of special value in containing any article of special value in respect of which the percentage charge required by Section 75 of the Act has not been paid.

12. Section 72 of the Act provides that the railway administration shall be responsible as a bailee under the aforesaid two sections of the Indian Contract Act for the loss, destruction or deterioration of animals or goods delivered to it to be carried by railway. This liability is subject to other provisions of the Act. Sub-section (3) of Section 72 makes it clear that nothing in the common law of England or in the Carriers Act, 1865, regarding the responsibility of common carriers with respect to the carriage of animals of goods, shall affect the responsibility of the railway administration under Section 72 of the Act. It may here be noticed that Section 8 of the Carriers Act, 1865, makes the carrier liable to the owner for the loss of or damage to any property delivered to such carrier where such loss or damage shall have arisen from the agents or servants and shall also be liable for loss of or damage to property where such loss or damage has arisen from the negligence of the carrier or any of his agents or servants except that in the latter case the value of the property has been declared if it exceeds Rs.100/-

The general responsibility of the railway administration under S. 72 of the Act arises upon execution of forwarding notes in the prescribed forms in respect of various articles and animals as provided by S.72 of the Act. Provision is also made for two types of rates, namely, owner's risk rate and railway risk rate. If animals or goods are carried at owner's risk rate, the railway administration is not responsible for their loss, destruction or deterioration or damage from any cause whatsoever except upon proof that the cause of such loss etc. was the negligence or misconduct on the part of the railway administration or any of its servants. The burden of proving such negligence or misconduct is upon the congener (Section 74-C of the Act) In case goods are carried at railway risk rate, the railway administration will be liable for any loss destruction or deterioration of the goods but the

extent of their liability will be the liability of the bailee under Section 152 and 161 of the Indian Contract Act.

13. Section 75 of the Act further curtails the responsibility of the railway administration as a bailee in respect of articles of special value were the percentage charge has not been paid. It is not disputed by the appellants that the railway administration is not responsible for the loss, destruction or deterioration of an article of special value in respect of which the percentage charge has not been paid if such loss, destruction or deterioration has been brought about involuntarily. But it is contended that even in a case where the percentage charge is not paid, the railway administration will be responsible if the loss, destruction or deterioration is caused by the railway administration or by such of its servants to whom the article of the special value was entrusted in the process of carriage. It is conceded that the railway administration will not be responsible in the case of a running train theft or even in a theft by railway employees other than those to whom the goods were entrusted. But it is contended that in the present case it has been proved by the appellants that the theft of the gold in question was by Damodar G. Pandey the Insurance Guard to whom the article was entrusted for carriage, that his possession is the possession of the railway administration, that there is, therefore, no question of loss to it and, therefore, the railway administration is fully responsible.

14. The learned Subordinate has given the following findings after appreciation of the evidence of witnesses produced by the respondent:-

- (1) In all probability the gold was stolen from the running train between Bombay Central and Ratlam and the possibility of its removal by one of the railway servants or by some one with the connivance of the railway servants at Bombay Central cannot be definitely ruled out.
- (2) Non-delivery was not due to the negligence or misconduct on the part of the railway administration but due to the loss of the parcel in suit to the railway.
- (3) Damodar G. Pandey the Insurance Guard, had been negligent in handling this package in the course of conveyance.

Therefore, the conclusion of the learned Subordinate Judge is that the railway administration were not guilty of negligence or misconduct although Damodar G. Pandey, the Insurance Guard was negligent in handling the package in the course of carriage. If the findings correct, the railway administration would not be liable under Section 75 of the Act. It is sought to be contended that Damodar G. Pandey, the Insurance Guard as an employee of the railway administration was himself guilty of the theft of the gold and since he had been entrusted with the custody, the railway administration would be responsible. This aspect of the matter has not been considered by the learned Subordinate Judge.

15. Assuming for the sake of argument that it was Damodar G. Pandey, the Insurance Guard, himself who was responsible for the theft the question arises whether the railway administration can be

fastened with any responsibility in respect of the loss of the parcel of gold.

16. The first case cited on the subject is reported in (1895) 2nd 19 Bom 159 in re:- Bala Ram Harichand . The Southern Marhatta Rly. Co. Ltd. In this case the parcel containing silver coins was handed over to the guard of the train. It was proved that the parcel had been stolen by the guard himself. The Chief Judge, Presidency Small Cause Court, Bombay, came to the conclusion that Section 75 of the Act covered all causes of loss, destruction or deterioration of parcels under whatever circumstances and the parcel must be considered to be lost to the railway administration. He referred the question to the High Court of Bombay which affirmed the finding. Reliance is placed by the appellants on the case reported in (1897) Pun Re 6 in re: Changa Mal v. B. N. W. Railway where Chatterji. J. was of the view that a thing is not lost in the proper sense of the term if the bailee of it detains it wrongfully or willfully or negligently delivers it to another and it is contended that since in the present case, the theft was committed by an employee of the railway administration to whom the gold was entrusted, it amounts to wrongful detention by the railway administration itself. We are of the view that if goods consigned to it for carriage are wrongfully detained by the railway administration itself, there is no question of any loss to the railway administration because the goods are still in its possession and, therefore, the railway administration will not escape liability by reason of Section 75 of the Act. But we find it difficult to hold that a theft or wrongful detention by the railway employee to whom the goods are entrusted would be theft or wrongful detention by the railway administration. The responsibility for the negligence or misconduct of railway servants can be fastened upon the railway administration only in a case covered by Section 74-A, Section 74-C (3) and Section 74-D of the Act because it is so provided in these sections. Section 75 does not include the negligence or misconduct of the railway administration nor does it provide for the liability of the railway administration for such acts of its servants.

17. There is abundant authority for the proposition that if any article of value is lost as a result of theft by railway servants, there is a loss to the railway within the meaning of Section 75 of the Act. Only reference may be made to the cases .

18. We may here notice the case reported in AIR 1949 All 223 in re: Governor-General in Council v. Mohammad Badr-i-alam where a learned Single Judge held, inter alia, that if a railway servant misappropriates the goods, the railway company could not be deemed to lose what a servant of the company is all the time keeping for his own enjoyment. This view was not accepted in a subsequent Division Bench decision of that court in re: Banarasi Stores v. President of the Union of Indian Republic for India where it was held that if a servant of the railway dishonesty removes a parcel from the railway premises for personal gain. it is a loss to the railway administration within the meaning of Section 75 of the Act.

19. A learned Single Judge of the Bombay High Court has expressed the view in the case in re: Martap Ali v. Union of India that the word "loss" as used in S. 75 of the Act includes loss on account of wrongful detention or conversion on the part of the railway administration. With respect, we do not agree with this view. In the case of wrongful detention or conversion by the railway administration itself, the goods must necessarily be in its possession or converted to have been lost to the railway administration.

20. On a review of all the cases and the construction of section 75 of the Act, we are of the view that if in respect of an article of value, the percentage charge required to be paid under Section 75 of the Act has not been paid, the railway administration would not be liable for the loss of the article even though the loss has been occasioned by the negligence/misconduct of its servant or by theft even by the very servant to whom the goods are entrusted but there would be no "loss" within the meaning of S.75 of the Act. If the railway administration itself as distinct from its servants, has wrongfully detained or misappropriated such article. Therefore even if the appellants succeed in their contention that the theft was committed by Damador G. Pandey, the Insurance Guard, the gold would be lost to the railway administration within the meaning of Section 75 of the Act and by reason of the non-payment of the percentage charge by the appellants, no responsibility can be fastened upon the respondent.

21. For these reasons, we dismiss the appeal but in the circumstances of the case leave the parties to bear their respective costs.

22. Appeal dismissed.