Indian Airlines Corporation vs Keshavlal F. Gandhi And Anr. on 31 May, 1961

Equivalent citations: AIR1962CAL290, 65CWN949, AIR 1962 CALCUTTA 290

JUDGMENT

Banerjee, J.

1. On October 19, 1953, the defendant Opposite Party no. 2 delivered to the defendant petitioner two package, said to contain 6000 Westing House torch-bulbs, to be carried by air from Bombay to Calcutta, under consignment Note No. Z-077672. The consignee was plaintiff-Opposite party No. 1.

2. Each of the two packages contained 3000 pieces of torch-bulbs, in a carton container, wrapped in hessian and bound by iron straps.

3. The consignment reached Calcutta on October 21, 1953. But as the consignee-plaintiff failed to take delivery of the consignment on arrival, the same was stored in the godown of the defendant-petitioner and a notice of arrival was sent to the consignee.

4. On October 24, 1953, the consignee-plaintiff took delivery of the said two packages and granted a Clear receipt for the same. According to the allegation of the consignee-plaintiff he brought the packages to his shop and on opening one package found that the said did not contain torch bulbs but only old periodicals, news prints, books, cotton, wool, pieces of fire wood and brickbats. The other package was also partly opened and similar materials were found inside. The plaintiff immediately got the packages surveyed by Marine Surveyors, Messrs. Norman Stewart and Co. and intimated the fact of loss of torch bulbs to the defendant No. .1 petitioner and the defendant No. 2 consignor along with a copy of the survey report of the marine surveyors above-named to the effect that the two packages did not contain torch-bulbs. Thereafter ;here was prolonged correspondence between the plaintiff-opposite party and defendant No. 1--Petitioner at the end of which the defendant No. 1 petitioner repudiated its liability.

5. Alleging that the loss of torch bulbs was due to wilful negligence and default alternatively misconduct on the part of the defendant No. 1, the plaintiff instituted the suit, out of which this Rule arises, claiming damages laid down at Rs. 1877/7-.

6. The claim was contested by the defendant No. 1 mainly on a two-fold ground. It was contended, in the firs; place, that the plaintiff had taken delivery of the packages on clear receipt and upon such delivery the defendant No. 1 ceased to be liable for any loss, alternatively, the defendant No. 1 was not liable, for the loss of the contents of the packages which were not declared nor examined nor checked by the defendant No. 1 and which packages had been delivered in good condition to the

plaintiff. It was contended, in the next place, that the packages had been accepted for carriage on the terms printed Overleaf on the consignment note No. Z-O77672, dated 19-10-53 and under those terms the defendant No. 1 could not be made liable.

7. The defendant No. 2 by its written statement contended that they had despatched the torch-bulbs in accordance with the order placed by the plaintiff and made Over the same to the carrier and thereafter had no responsibility therefor.

8. The trial court decreed the claim of the plaintiff against defendant No. 1 for Rs. 1854/3/-and dismissed the case against defendant No. 2. Thereupon, the defendant No. 1 moved the court below for a new trial under Section 38 of the Presidency Small Causes Court Act for having the judgment entered being set aside and a new and a different judgment being entered in its place. The Court below dismissed the application and affirmed the judgment of the trial court Against the order aforesaid the defendant No. 1 moved this court and obtained this Rule.

9. When the the Rule came up for hearing before P.N. Mookerjee, J. his Lordship referred the matter to a Division Bench, with the following observations :--

> 'This case, on the extreme contention, raised by Mr. Hoy, that his client can claim absolute exemption from all claims for damages under all circumstances in view of the contract between the parties and in view of the authorities, cited by him, namely, Jellicoe v. The British Indian Steam Navigation Co., ILR 10 Cal 489 at 496, appears to me to involve a question of sufficient complication and importance which requires to be settled by a Bench decision of this Court, or, if necessary, even by a larger Beach ....."

10. The question that arises for our consideration is the extent of liability of an air carrier for carriage of goods by air and how far that liability can be limited by contract.

11. There is no dispute that neither the Carrier's Act (III of 1865), which relates to the liability of common carriers by land or inland navigation nor the Indian Carriage by Air Act (XX of 1934), which gives effect to the Warsaw Convention for the unification of certain rules to international carriage by air has any application to the facts of the present case.

12. Before we proceed to examine the law on the subject, it is necessary for us to recite the terms of carriage contained in the air consignment Note (Ex. 1) :--

> "Carriage of freight is arranged on the condition that the carrier reserves to itself the right without assigning any reason therefor to cancel or to delay the commencement or continuation of flight or to alter the stopping places or to deviate from the route and shall be exempt from any liability under the law whether to the sender or to the consignee or to their legal representatives in case of damage or loss or pilferage Or detention from any cause whatsoever (including negligence or default of pilots, agents, flying ground or other staff or employees of the carrier or breach of statutory

> or other regulations) whether in the course of journey or prior, or subsequent thereof and whether while the freight be on board the aircraft or otherwise".

13. Mr. Prafulla Kumar Roy, learned Advocate for the petitioner, contended that the Carriers Act, 1865, which does not deal with inland carriage by air and the Indian Carriage by Air Act, 1934, which only dealt with international carriage by air, being out of the way, the relationship between the contracting parties for carriage of goods by air must be governed by the common law as in England and further that the English common Law permitted common carriers to contract themselves out of liability for loss of or damage to goods carried. Mr. Manindra Nath Ghosh, learned Advocate for the Opposite Party No. 1, contended, on the other hand, that the rights and liabilities of the contracting parties must be governed by Chapter IX of the Indian Contract Act, dealing with bailment, and particularly by Sections 151 and 152 or the said Act.

14. The English Common Law governing the liability of Common Carrier was re-stated by Lord Wright in the case of ludditt v. Ginger Coote Airways Limited, (1947) AC 233 in the following language:

> "The liability of a common carrier of passengers was settled by the decision of the Exchequer Chamber in 1869 in Readhead v. Midland Rly. Cp., (1869) 4 QB 379. It was there held that the liability of a general or public or common carrier of passengers is more limited than that of a common carrier of goods. By the custom of the realm a common carrier of goods was at common law "bound to answer for the goods at all events. .....The law charges this person thus entrusted to carry goods against all events but acts of God and of the enemies of the King'. The carrier of passengers is not subjected to a duty so stringent His obligation at common law, as was held in the leading case just cited, is to carry 'with due care'. One reason for the distinction, no doubt, is that the carrier of goods is a bailee of the goods which he carries, whereas a carrier of passengers is not a bailee of his passengers. Both classes of carriers however, are subject to the obligations which arise from their exercising a public profession which requires them to carry for all and sundry, subject to the obvious limiting conditions.
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> The common carrier of goods was nevertheless at common law free to limit his stringent obligations by special contract. He still remained according to his profession, but he could all the same insist on making his own terms and refuse to carry except on those terms, provided that there were no statutory conditions limiting his right"

15. The inapplicability of the Indian Contract Act 1872 in determining liability of a common Carrier was decided by the Privy Council, as far back as 1891, in the case of Irrawaddy Flotilla Co. Ltd. v. Bugwandass, 18 Ind APP 121 (PC). Lord Machaghten in, delivering the Judgment observed:

> "The Act of 1872 does not profess to be a complete Code dealing with the law relating to contracts. It purports to do no more than to define and amend certain parts of that

law. No doubt it treats of bailments in a separate chapter. But there is nothing to show that the Legislature intended to deal exhaustively with any particular chapter or sub-division of the law relating to contracts. On the other hand, it is to be borne in mind that at the time of the passing of the Act of 1872, there was in force a statute relating to common carriers, which, in connection with the common law of England, formed a code at once simple, intelligible, and complete. Had it been intended to codify the law of common carriers by the Act of 1872, the more usual course would have been to have repealed the Act of 1865 and to re-enact its provisions, with such alterations or modifications as the case might seem to require. It is scarcely conceivable that it could have been intended to sweep away the common law by a side wind.

* *

At the date of the Act of 1872, the law relating to common carriers was partly written, partly unwritten, law. The written law is untouched by the Act of 1872. The unwritten law was hardly within the scope of an Act intended to define and amend the law relating to contracts. The obligation imposed by law on common nothing to do with contract in its origin. It is a duty cast upon common carriers by reason of their exercising a public employment for reward. 'A breach of this duty', says Dallas, C.J. Bretherton v. Wood, (1821) 3 Br. and B. 54 (62), 'is a breach of the law, and for this breach an action lies founded on the common law which action wants not the aid of a contract to support it.' * * It was hardly disputed that the liability of a com mon carrier as an insurer was an incident of the contract between the common carrier and the owner of the property to be carried. Is that incident inconsistent with the provisions of the

Act of 1872? No one could suggest that it was inconsistent, merely by reason of its being a term of the contract implied and not expressed. Then it would seem that the proper way of trying whether it is or is not inconsistent with the provisions of the Act of 1872 would be to write it out as part of the contract. Would it then be inconsistent?

Clearly not. It would be within Section 152; it would be a special contract saved by that section. It is difficult to see how a term of a contract can be inconsistent with the provisions of the Act of 1872 of it is implied, while it would not be inconsistent if it were expressed in the contract.

> These considerations lead their Lordships to the conclusion that the Act of 1872 was not intended to deal with the law relating to common carriers, and notwithstanding the generality of some expressions in the chapter on bailments, they think that common carriers are not within the Act."

16. The Contract Act being thus of the way, of its own force, so far as common carriers are concerned, and there being no dispute that the petitioner is a common carrier, we have now to decide how far Mr. Roy is right in his contention that the relationship between the contracting parties must be governed by the common law as in England. As far back as 1873 the Bombay High Court had held in the case of Kuverji Tulsidas v. G. I. P. Rly. Co., ILR 3 Bom 109, that the effect of the Indian Contract Act, 1872, was to relieve the common carriers from the liability as insurers answerable for the goods entrusted to them 'at all events', except in the case of loss Or damage by act of God or the Queen's enemies and to make them responsible only for that amount of care which the Act required of all bailees alike in the absence o special contract. The same point came up before a Full Bench of this Court in the case of Mcothora Kant Shaw v. Indian General Steam Navigation Co., ILR 10 Cal 166. Dissenting from the decision in ILR 3 Bom 109 (supra) this Court held that the common law of England, regulating the responsibility of the common carriers, was at the time of the passing of the Carriers Act, 1865 and is still in force in this country and is unaffected by the provision of the Indian Contract Act. In Irrawaddy Flotilla Co's case, 18 Ind App 121 (PC) (supra), their Lordships of the Privy Council also observed that they were compelled to decide in favour of the view of the High Court of Calcutta and against that of the High Court of Bombay.

17. This Court had again to pronounce its view on the protection enjoyed by the common carriers, in a Small Causes Court reference in ILR 10 Cal 489. In that case the plaintiff shipped two plate-glass show cases from Calcutta to Rangoon, by a Steamer of the defendant Company and signed a Bill of Lading which contained the following clause:

> 'Carried and delivered subject to the conditions aftermentioned.....the loss or damage for any act, neglect or default whatsoever of the pilot, master or mariners or other servants of the Company, etcetra, excepted'.
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> In landing the two cases one of them was entirely destroyed owing to the carelessness of the Company's servants. The plaintiff sued the Company setting out that the damage was occasioned by the negligence of the Company's servants. The defendant company (who were not subject to the Carriers Act) relied on the aforementioned Bill of Lading. A Division Bench of this Court consisting of Garth, C.J. and Cunningham, J. answered the reference with the following observation:
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> "The defendants of course, are not subject to the provisions of the Carriers Act; and they have a right to impose upon shippers any terms, however unreasonable, which the latter think proper to accept. They may thus free themselves from the consequences of their own negligence or default, however gross and wilful.

> So long as the law allows one class of carriers to insist upon contracts of this kind, and the public submit to have their goods carried upon such terms, Courts of Justice are quite powerless to protect them."

The same point came up before a Letters Patent Bench of the Madras High Court, consisting of White, C.J. Wallis and Sankaran Nair, JJ. in a case Sk. Mahammad Ravuther v. British India Steam Navigation Co. Ltd., reported in ILR 32 Mad 95 (FB). In that case it was held per curium thai in England it was competent to a ship owner to protect himself, by express contract, from liability for the negligence of himself or his servant that was also the law applicable in India. Sankaran Nair, J., in a dissenting Judgment, which noted for the forcefulness of its argument, observed:

> (a) "Section 148 of the Indian Contract Act as pointed out by the Judicial Committee in ILR 18 Cal 620 at p. 627 (PC), undoubtedly includes bailment for carriage. This is also the view of the Calcutta High Court in Mackillican v. Compagne Des Messageries Maritimes De France, ILR 6 Cal 227, and of the Bombay High Court in ILR 3 Bom 109. A shipowner is a bailee within the terms of that section. Under Section 151 of the Act, the defendants therefore are bound to lake asmuch care of the goods as a man of ordinary prudenee would under similar circumstances. It is only the incident of any contract not inconsistent with its provisions that remains unaffected by the Contract Act. (See Section 1 of the Contract Act). The incident of the contract before us that the bailee is exempt from taking the care required by Section 151 appears to me to be clearly inconsistent with that section. Section 152 seems to make this clear. It declares that the bailee's liability is limited as de cleared by Section 151, in the absence of any special contract,' or in other words he may by contract undertake a higher responsibility for instance that of an insurer. The Calcutta High Court and the Judicial Committee relied upon this section to hold that these provisions did not limit the liability imposed by the common law rule recognized in the Carriers Act, 1865, which was the only point decided in that case. The provision in Section 152 that a bailee may undertake a higher responsibility, the absence of a similar provision that he may limit the liability imposed by Section 151, and the fact that, in the Chapter IX relating to Bailment, whenever a rule of law is intended to operate only in the absence of a contract to the contrary it is expressly so stated--(see Sections 163, 165, 170, 171 and 174)--leave no doubt in my mind that a bailee's liability cannot be reduced by contract below the limit prescribed by Section 151."
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> (b) "The next question is whether the contract exempting a shipowner from the consequences of the negligence of himself or his servants in not taking reasonable care or the care referred to in Section 151 of the Indian Contract Act is opposed to public policy and is therefore void. See Section 23, Indian Contract Act.

I have already pointed out that I can see no consideration for this stipulation. It has been held to be unreasonable in the case of railway companies (Peek v. North Staffordshire Ry. Co., (1863) 10 HLC 473) and in Carver's book it is admitted that the contract need not be reasonable. If the obligation is imposed upon a common carrier for the benefit of the public, he cannot claim exemption by virtue of

an unreasonable stipulation. The reason why a common carrier is bound to receive goods tendered and the great responsibility of an insurer is imposed upon him is that necessity compels the owners of the goods to trust him. * * Such an exemption clause is therefore clearly against the interests of the mercantile community and not necessary in the interests of shipowners.

I am of opinion, therefore, that it is against public policy to enforce this stipulation, and that it must be left to the legislature, if necessary, to introduce a rule of law, held unreasonable in England and utterly unsuited to the conditions of this country."

18. The protest raised, by Sankaran Nair, J., however, remains a lone protest. In Bombay Steam Navigation Co. v. Vasudev Baburao Kamat ILR 52 Bom 37: (AIR 1928 Bom 5) Marten, C.J. and Blackwell, J. followed the majority view in Sk. Mahammad Ravuther's case, ILR 32 Mad 95 (FB), (supra) with the following observations:

> "As far as the Indian Carriers Act is concerned, that does not, I think, apply to carriage by sea. I exclude of course inland navigation. There is some difference of opinion in certain High Courts as to whether the bailment sections of the Indian Contract Act apply to carriage by sea. But in ILR 32 Mad 95 (FB), the point now raised was considered, and Sir Arnold White and Mr. Justice Wallis, as he then was held that: 'In England it is competent So a shipowner to protect himself by express contract, from liability for the negligence of himself or his servants. This is also the law applicable in India'.
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> Mr. Justice Sankaran Nair took the contrary view, holding that it was inconsistent with the provisions of the Indian Contract Act and the manifest intention of the Legislature in enacting such provisions.
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> But we see no adequate reason here to adopt the view of the learned dissenting Judge. Accordingly we do not think that this latter point affords an effective answer to the present revisional application."

19. The same view was reiterated in the case of Lakhaji Dollaji and Co. v. Boorugu Mahadeo Rajanna, 41 Bom LR 6: (AIR 1939 Bom 101) by Beaumont, C.J. (Kania, J. sitting with him) in the following language:

> "It is argued by Mr. Taraporewala that a bailee cannot contract himself out of Section 151 an that every bailee must at any rate be liable to the extent laid down in Section 151. This Court in ILR 52 Bom 37: (AIR 1928 Bom 5), (supra) following the case of ILR 32 Mad 95 (FB), (supra) held that it was open to a bailee to contract himself out of the obligations imposed by Section 151, and I feel no doubt whatever that, that view is correct. The Act does not expressly prohibit contracting out of Section 151 and it would be a startling thing to say that persons sui juris are not at liberty to enter into such a contract cf bailment as they may think fit."

20. In a much later case decided by the Madras High Court and , British India Steam Navigation Co. Ltd. v. Sokkalal Ram Sait, Govinda Menon, J. (Kishnaswami Nayudu, J. sitting with him) followed the majority view in ILR 32 Mad 95 (FB) (supra) and expressed their disinclination to follow the view expressed by Sankaran Nair. J. on the following lines of reasonings:

> "Sankaran Nair, J. held that the rule of English law, which allows ship owners to exempt themselves, by express contract, from liability for negligence cannot be applied in India, as it is inconsistent with the provisions of the Indian Contract Act and the manifest intention of the Legislature in enacting such provisions. Then the learned Judge referred to Sections 148 and 151 of the Contract Act. He was further of opinion that a contract limiting such liability will be opposed to the public policy and void under Section 23 of the Contract Act, as it will be against the interests of the mercantile community and not necessary in the interests of the shipowners. Though there may be something to be said in favour of the view taken by Sankaran Nair, J. still we feel that we are bound by the consensus of authority in this court as well as other High Courts."

21. We now need refer to two unreported decisions, certified copies of which were produced before us. One is a decision by the Assam High Court in S. A. 76 of 1954 and S. A. 112 of 1955 : since reporied in (AIR 1960 Assam 71) Rukmanand Aji saria v. Airways (India) Ltd. in which Sarju Prosad, C.J. and Deka, J. held that the common law of England would apply to common carriers and not Indian Contract Act, 1872, and that the parties to the contract of carriage must be bound by the terms of their special contract. The other unreported decision is of this Court, in Suit No. 327 of 1954 (Cal); National Tobacco Co. of India v. Indian Airlines Corpora-lion, in which Law, J. reiterated the same view.

22. We have gone into the case law on the point with some exhaustiveness. We have done so because the weighty observations of Sankaran Nair, J. compel serious attention, attractive as they are for their freshness and originality . But it seems to us that it is now too late to take a turn from the beaten track of judicial precedents, which have since acquired the sanctity of stare decisis.

23. We, therefore, hold, following the long line of precedents hereinbefore referred to, that the defendant Air Lines Corporation is a common carrier and the relationship between the parties to the contract of carriage was governed by the common law of England, governing the rights and liabilities of common carriers. That law, we hold, permits common carriers totally to contract themselves out of liabilities for loss or damage of goods carried as common carriers. That was what was done in the present case, as the consignment note (Ext. 1) shows. The claim of the plaintiff fails because of the perils contained in the contract itself. Parties to a contract make their own law. It is not for the Court to make a contract for the parties or to go outside the words they used. If the contract offends against the provisions of the Contract Act, for example, if opposed to public policy, then only a Court may strike down the contract, but even then cannot make a new contract for the parties.

24. The contract in 'Ext. 1' does not offend against the provisions of the Indian Contract Act. It gives complete immunity to the defendant No. 1 from loss or damage to goods consigned to its care for carriage. The plaintiff has thus contracted himself out of his right to claim damages for loss of the consignment. That is why his claim must fail.

25. We make this Rule absolute and direct that the plaintiffs' suit be dismissed. There will be no order as to costs in this Rule.

Niyogi, J.

26. I agree.