Firm Mahesh Glass Works vs Governor General In Council on 24 February, 1950

Equivalent citations: AIR1950ALL543, AIR 1950 ALLAHABAD 543

JUDGMENT

Desai, J.

1. This is a second appeal by a plaintiff whose suit for damages against the Governor. General in Council through the East Indian and Oudh and Tirhut Railways, has been dismissed by the Courts below.

2. The facts are these: The appellant, which is a registered firm carrying on business at Firozabad, booked on 1st September 1941 a consignment of glass bangles from Firozabad on the E. I. Railway to Hajipur on the O. T. Railway. Kanpur lies on the way from Firozabad to Hajipur, but there are two alternative routes between Firozabad and Kanpur and again two alternative routes between Kanpur and Hajipur. The shorter route between Firozabad and Kanpur is the direct broad-gauge route; the alternative route is via Farrukhabad and longer. There is broad-gauge route between Firozabad and Farrukhabad and meter gauge route between Farrukhabad and Kanpur. The shorter route between Kanpur and Hajipur is via Mokameh; there is broad-gauge between Kanpur and Mokameh and meter, gauge between Mokameh and Hajipur. The alternative route via Lucknow and Sitapur is longer, but is entirely meter-gauge, The glass bangles were not packed in anything; they were made into garlands by passing a string through a number of bangles and tying its two ends together. These garlands were packed into the wagon on floor padded with straw. The consignment was booked under risk note Y. This risk-note is used when the consignor elects to enter into a general agreement for a term not exceeding six months for the despatch of "excepted" articles, that is, the articles specified in schedule II to the Railways Act whose value exceeds RS. 100, without payment of the percentage on value authorised in Section 75 of the Act. It is printed in the risk-note that the consignor was required to pay, or engage to pay, a percentage on the value of consignment by way of compensation for increased risk, that he elected not to pay it and that consequently he agreed to hold all railway administrations "harmless and free from any loss, destruction or deterioration of, or damage to, the said consignments from any cause whatever, before, during and after transit, over the said railway, or other railway lines."

3. It contains a special clause, dealing with deviation. It is in these words:

> "In the event of any interruption of through communication on the booked route due to causes over which the railways have no control, traffic may be carried by the next shortest open route on the conditions applying to the booked route in respect of liability and freight."

In the risk note it is mentioned that the consignment would be forwarded to Hajipur via FKD and CAA. There is also an endorsement on it "dearer route selected by sender." In the receipt issued to the consignor also it is mentioned that the consignment would go via FKD, meaning Farrukhabad. The bangles were-loaded by the appellant's servants in a wagon. The wagon reached Farrukhabad on 2nd September 1941 where it was unloaded by the appellant's servants and the goods were loaded again in a meter-gauge wagon on 3rd or 4th September. The appellant had selected this route because it could do the transhipment at Farrukhabad which is nearer Firozabad and the wagon could go direct from Farrukhabad to Hajipur. The wagon reached Kanpur on 6th September 1941. The railway authorities there, instead of sending it on to Lucknow and Hajipur, unloaded it themselves and placed the goods in a broad-gauge wagon and despatched it to Mokameh where it arrived on 11th September. There another transhipment was done by the railway authorities and the goods were placed in a meter-gauge wagon on 22nd September and the wagon was dispatched to Hajipur where it reached on 26th September. No information of the transhipments done at Kanpur and Mokameh were given by the railway authorities to the plaintiff. When the appellant went to take delivery of the consignment at Hajipur, it was found that many bangles were broken and many were stolen. The appellant took delivery of the consignment and after the necessary formalities instituted this suit against the railway administrations for damages. It claimed damages under four heads; Rs. 73-7-0 on account of the shortage, Rs. 689 13 0 on account of breakage of bangles weighing 7 maunds, 13 seers, Rs. 650 on account of the loss of market due to the late delivery of the consignment, and it claimed something on account of interest. The total amount claimed by it was Rs. 1500.

4. The suit was contested by the railway administrations. They denied negligence on their part. They conceded that the booked route was via Farrukhabad, Kanpur and Lucknow, but they justified the deviation from the route at Kanpur by pleading that there were breaches on the through meter-gauge route via Lucknow. They pleaded that the bangles are "excepted goods" mentioned in Schedule 2, Railways Act, and that as the appellant did not declare their nature and value and did not pay the additional percentage, they were exempt from all liability, The appellant's reply to this was that Section 75, Railways Act, did not apply to the consignment because there were no packages or parcels, and that the protection given by it and also by the risk-note Y could not be claimed by the railway administrations when they had deviated from the booked route. The railway administrations also denied that there was undue delay in the delivery of the consignment. The Courts below found that the railway administrations were negligent and guilty of undue delay in delivering the consignment at Hajipur and were not justified in deviating from the route and that they were protected against the appellant's claim by the provisions of Section 75 and the risk-note Y.

5. Section 75 reads as follows :

> "(1) When any articles mentioned in Schedule 2 are contained in an; 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."

Schedule 2 includes "all articles made of glass". The bangles, therefore, come within the excepted articles. But this fact alone is not enough to protect the railway administrations; the bangles must have been contained in a parcel or package and the value of the bangles in a parcel or package must have exceeded Rs. 100. The words "Rs. 300" were substituted in place of the words "Rs. 100" by the amendment Act of 1947. We have to consider the law as it existed when the consignment was booked. The bangles were not wrapped up in, or covered with, anything. The value of the whole consignment was certainly more than Rs. 100, but it is not known of how many garlands it consisted, how many garlands were broken or stolen and what was the value of each of the garlands broken or stolen. The evidence is of the total quantity of the stolen bangles but not of the number of garlands in which those bangles were contained. As regards the breakage, all we know is the value of the broken bangles; we do not know in how many garlands they were contained and what was the value of those garlands. For the applicability of Section 75, it was necessary for the railway administrations to prove that the bangles were "contained in any parcel or package delivered" to them and that the value of the bangles "in the parcel or package" exceeded one hundred rupees.

6. The words 'parcel' and 'package' are not defined in the Railways Act. The word "parcel" is defined in Section 46 (c) to mean any package of merchandise or other goods, but that definition is to be used only whore the word occurs in chap. V. Section 75 does not occur in that Chapter. According to Webster's Dictionary the meaning of "parcel" is : "a number or quantity of things wrapped up together, a bundle, package, packet;" and also: "a collection of articles, as of merchandise put up in lots for sale. The meaning of "package" is : "a bundle made up for transportation, a packet, a bale, parcel ;" and also : "that in which anything is packed, a box, ease, barrel, crate, etc. in which goods are packed; a container." Section 76 is based upon Section 1, English Carriers Act, 1830, 2 George IV and 1 William IV, C. 68, which lays down that "no mail contractor, stagecoach proprietor, or other common carrier by land for hire shall be liable for the loss of or injury to any article or articles or property of the descriptions following ; gold or silver coin contained in any parcel or package which shall have been delivered, when the value of such article or articles or property aforesaid contained in snob parcel or package shall exceed the sum of ten pounds, unless at the time of the delivery thereof the value and nature of such article or articles or property shall have been declared by the person and such increased charge as hereinafter mentioned, or an engagement to pay the same be accepted by the person receiving such parcel or package." It is stated in Disney's "Carriage by Railway", 8th Edn., p. 20 that:

> 'The Act only applies to the things mentioned when they are contained in a 'parcel or package.' So that if any of the things were sent by a carrier loose, without any packing, the Act would have no application, and the carrier no protection. The carrier however, would be justified in refusing to accept such articles without packing, as he is justified in retailing to accept any goods which are not properly packed if packing is reasonably necessary for their safety in transit," (Kahn-Fireund reproduces this with slight alterations of no consequence in his Carriage by Inland Transport, 1946 page

116.

In the present case the bangles cannot be said to have been loosely packed in the wagon. Had they not been made into garlands, it could have been said that they were loosely packed and the railway administrations would not have been able to claim the protection of Section 76. What was delivered to them was not a quantity of loose bangles but a number of garlands, each garland made up of bangles tied together with a string. Each garland must be considered to be a bundle or package. It is not at all essential for a thing to come within the meaning of "parcel or package" that the articles contained in it are covered and concealed from view. Even the least amount of concealment is not essential. If it were said that some concealment is essential, great difficulty would arise in considering how much concealment is essential. A wrapped up article would come within the meaning of "parcel or package " but so can a collection of articles which are not wrapped up in anything. Ordinarily, when a number of articles are made into a "parcel or package" there is some concealment of their nature, but it is also possible to pack articles into something without concealing their nature to any extent. In Kundan Lal Barumal v. Secy. of State, 11 Lah. 4 : (A.I.R. (16) 1929 Lah. 698), an unpacked and uncovered silver bar was held to be a parcel or package and it was held that no packing or covering is at all essential. In Whaite v. Lancashire & Yorkshire Ry. Co. (1874-9 EX 67 : 22 W. R. 374) Bramwell B relied upon the fact, that though the railway company could see that there ware pictures in the wagon, they could not see their exact nature because it was concealed by. Whaite's mode of packing them in the wagon But this concealment of the exact nature of the pictures was not the basis of the decision that the wagon came within the meaning of "Parcel or Package." Whaite himself had stated that he had "packed" pictures and other articles in the wagon and thus tacitly admitted that the wagon was a parcel or package. What he really-contended-was that such a huge thing as a wagon could not corns within the meaning of. a "parcel or packages " and this contention was overruled, In Studebaker Distributors Ltd. v Charlton. Steam Shipping Co. Ltd., (1938) 1 K. B. 459 : (107 L. J. K. B. 203), Studebaker cars were put on board a ship without any covering, or, to state in another way, just as they came from the Works, the consignment was governed by a bill of lading which contained a clause to the effect that it was agreed "that the value of each package shipped hereunder does not exceed the sum of two hundred and fifty dollars, or its equivalent in the currency of the country where the vessel discharges on which basis the rate of freight is adjusted, and the carrier's liability shall in no case exceed that sum, unless a value in excess thereof be especially declared and elated herein, and such extra freight as may be agreed on paid ....." The cargo was damaged during the voyage and the question arose whether the Steam Shipping Company was entitled to the protection given by the clause, the answer to which depended upon whether the cars could come within the meaning of "package." Lord Goddard J. could not see how he could hold that there was any package to which the clause could refer. He observed at page 467:

> "Package' must indicate something packed. It is obvious that this clause cannot refer to all cargoes that may be shipped under the bill of lading; for instance, on a shipment of grain it could apply to grain shipped in sacks, but could not, in my opinion, possibly apply to a shipment in bulk."

7. I consider that a bare article like a car or a silver bar or a bangle cannot possibly be described as a parcel or package; in order that an article can be said to be "contained" in a parcel or package, it is necessary that some other article is used with it in order to protect it, or cover it, or keep it in position or keep it together with another article or articles. There was absolutely nothing used with the silver bar in Kundan Lal's case : (11 Lah. 4 : A. I. R. (16) 1929 Lah. 698), and with great respect to the learned Judge who decided it I am unable to agree that it came within the meaning of "parcel or package." If even a string had been tied round it, it might have been possible to say that it wag a parcel or package. If the Studebaker cars in the case referred to above could, not come within the meaning of 'parcel or package," the silver bar certainly could not. In Morritt v. North Eastern Rly. Co., (1876) 1 Q. B. 302 : (45 L. J. Q. B. 289), two water colour drawings were tied by a rope face to face; they were upon a paper, Stretched upon canvas and glazed and the canvas was visible at the back. Morritt, who was travelling by a train, entrusted them to the guard but without declaring their value. At the junction, owing to the negligence of the railway servants, they were not taken out of the guard's van and were overcarried. Morritt .got them back but not until delay had occurred and he bad suffered some damage. There was only a rope used on the pictures; still it was conceded that they "were contained in a parcel or package within the meaning of the Carriers Act." The Court of Appeal applied Section 1, Carriers Act, and dismissed Morritt's suit for damages. There only a rope was used to convert the pictures into a parcel or package. In the case before us also ropes or string were used and the garlands must be held to be parcels or packages. The reason why the English Carriers Act was enacted is as stated in its preamble, that "through the frequent omission by persons sending such parcels and packages to notify the value and nature of the contents thereof, so as to enable such mail contractors, stage coach proprietors, and other common carriers, by due diligence to protect themselves against losses arising from their legal responsibility, and the difficulty of fixing parties with knowledge of notices published by such mail contractors, stage coach proprietors, and other common carriers, with the intent to limit such responsibility, they have become exposed to great and unavoidable risks, and have thereby sustained heavy losses."

8. This must be taken to be the object behind the enactment of Section 75 also. There is nothing about concealment of the nature of the contents of parcels and packages in the reason given in the preamble. Section 75 does not concern itself only with the consignor's declaring the nature of the contents of a parcel or package to the railway administration; it also concerns itself with his declaring their value and paying the additional percentage on the value on account of increased risk. Even though the bangles were tied together in such a way that their exact nature was visible, the garlands came within the meaning of parcel or package. If a number of books without being wrapped in anything are simply tied together with a string, without any violence to the language one could say that they formed a 'parcel" of books. A bare string tied round them would certainly not conceal their true nature to any extent.

9. Each garland was a parcel or package; it is not that all the garlands together formed one parcel or package. The railway administrations have failed to prove that each garland was worth more than Rs. 100. The plaintiff was bound to declare the nature and value of each garland only if its value was more than one hundred rupees. It was not bound to do so merely because the value of all the garlands taken together was worth more than one hundred rupees. The words "parcel or package" do not include plural; Ghulam Albas v. Secretary of State, A.I.R (14) 1927 Nag. 328 : (103 I. C. 766). It is the parcel or package that is lost or destroyed which should have contained excepted goods of the value of more than RS. 100. The legislature has avoided using the word "consignment;" so the excepted goods of the value of more than Rs. 100 must be contained not in the whole consignment but in the particular parcel or package chat is lost or destroyed. If several parcels or packages are lost or destroyed, each must have contained excepted goods worth more than Rs. 100. The words "parcel or package" could not have been used for only some parcels or packages included in a consignment. Wort J. laid down in Sorabji Dadabhai v. B. N. Rly. Co., A. I. R. (23) 1936 Pat, 393 at p. 395 : (15 Pat. 394) :

> "In such a case the consignor or the customer must declare the value of a parcel or package. It may very well be that the word "parcel" is used in the technical sense of covering the whole consignment, but it is I think sufficiently clear from the section that the railway company could have called upon the plaintiff to value each of these packages."

Rowland J. who agreed with him stated :

> "..... the section strictly interpreted, contemplates a declaration regarding the contents, and their value, of each package."

In Herschel and Meyer v. G E. Rly. Co., (1906) 96 L. T. 147 :(12 Com Cas. 11), some bales of skin were consigned. A declaration of their value was made but only for customs purposes. It was held that this declaration was not sufficient under Section 1, Carriers Act. Kennedy J. observed at page 151:

> "I am strongly of opinion, that it would never be within the meaning of the section to give a lump description of two or more parcels any one of which might contain the whole value, and certainly any one which might be under the value of £10 which must be the value to bring that section into play. I think it must be a declaration with regard to the contents of the particular parcel according to the words of the Act."

9. I am, therefore, of opinion that each garland should have been of the value of more than Rs. 100 in order to be governed by the provision of Section 75. As it is nobody's case that it was worth more than Rs. 100, the railway administrations are not entitled to claim protection against the liability for the loss and destruction of some garlands on the ground that their contents and value were not declared.

10. The law that every person who undertakes to carry as a common carrier impliedly undertakes to proceed without deviation from the usual and ordinary course to the place of delivery, is well settled : See Davis v. Carrett, (1830) 6 Bing. 716 : (8 L. J. C. P. 253) ; Sevy. of State v. Kesho Prasad, 1932 A.L.J. 788 : (A.I.R. (19) 1932 ALL. 584), Kishan Lal v. B. B. & C. I. Rly, Co. 1933, A. L. J. 855: (A. I. R. (25) 1938 ALL.561), Hales v. London N.W. Rly. Co. (1863) 8 L. T. (N. S.) 421 : (32 L. J. Q. B. 292), Nac Namera's Law of Carriers, Edn. 2 page 30. If a carrier deviates from the usual route and the goods are lost, even by inevitable accident, he is liable; for under such circumstances the loss is traced back throgh all the intermediate causes to the first departure from duty. As stated by Tindal, C. J. in Davis v. Garret, ((1830) 6 Bing. 716 : 8 L.J. C.P. 253) :

> " ... no wrong-doer can be allowed to apportion or qualify his own wrong; and that as a loss has atullay happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act he cannot set up as an answer to the action the bare posibility of a loss, if his wrongful act had never been done."

The risk notes which consignors execute are available only for the booked or usual route and if there is any deviation from the route, the railway administration cannot rely upon them for the purpose of reducing their liability. This is established by Secretary of State v. Kesho Prasad, (1932 A. L. J. 788 : A. I. R. (19) 1932 ALL. 584), Kishan Lal Matrumal v. B. B &C.I. Rly., (1933 A. L. J. 855 : A. I. R. (25) 1938 ALL. 561), London N. W. Rly. Co. v. Neilson, (1922) 2 A. C. 263 :(91 L. J. K. B. 680) and Bodenham v. Bunnett, (1871) 4 price 31 ; (18 R. R. 686). In Neilson's case, (1922)-2 A. C. 263 : 91 L. J. K. B. 680) Lord Atkinson stated that when a special provision is introduced into a contract evidenced by a risk note " .... it must be held in the absence of language indicating the contrary, to refer to the subject-matter of the contract and that alone namely, the carriage of the goods from the point of departure to the destination named, by the route expressly or impliedly indicated,"

> The ordinary liability of railway administration is that of a bailee, vide Section 72. It is open to a railway administration to reduce its liability by entering into a special contract with the consignor; the various risk notes which consignors execute are nothing but these special contracts. When owing to deviation, a risk note becomes unavailing, the statutory liability under Section 72 is restored. The exemption from liability under Section 75 is a statutory exemption and not a exemption granted under any special contract such as that contained in a risk note. The provisions of Section 72 are subject to Section 75. It follows that even if there be a deviation from the usual or booked route the railway administration, would be entitled to claim the protection of Section 75. In Davis v. Garret, (1830-6 Bing. 716 : 8 L. J. C. P. 253), Bodenhem v. Bonnett, (1817-4 Price 31 : 18 R. R. 686) Ellis v. Turner,(1800) 8 T. r. 531:(5 R.R. 441) and Sleat v. Fagg, (1822) 5 B & Ald. 342 : (24 R. R. 407), railway administrations were held liable on account of deviation. They were all cases, decided prior to the enactment of Carriers Act and where the acts of deviation were intentional or wilful amounting to acts of misfeasance. So they were distinguished in Morritt v. N. E. Railway Co., (1876) 1. Q. B. 302 : (45 L. J. Q. B. 289) and Hinton v. Dibbin, (1842) 2 Q. B. 646 : (11 L. J. Q. B. 113). In Hinton v. Dibbin, (1842-2 Q. B. 646 : 11 L. J. Q B. 113), even though a railway administration was guilty of gross negligence, it was held

> not liable for the loss because the consignor had not declared the nature and value of the goods though he should have done so under Section 1, Carriers Act. Lord Denman stated at p. 665 :
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> "... the language of the first section seems to us to be perfectly clear and unambiguous, without exception or restriction, and that none can fairly be implied from any other part of the Act."

In Morritt's case, (1876-1 Q. B. 302 : 45 L. J. Q. B. 289)which went up to the Court of Appeal, Mellish L J. repelled the argument that the railway company was not entitled to the benefit of Section 1 of the Carriers Act because it deviated from the route by carrying the consignment beyond the point of destination, by saying that if the railway company were made liable in such a case "the protection of the Act would be reduced to nothing." The cases of Kesho Prasad (1932 A. L. J. 788 : A. I. R. (19) 1932 ALL. 584) and Kishan Lal Matrumal, (1933 A. L. J. 855: A.I.R. (25) 1938 ALL, 561), were both of risk notes A & B and neither of them was of excepted goods; so the question of the effect of deviation on a railway administration's claiming the protection under Section 75 did not arise. There was undoubtedly deviation in the present case, the railway administrations having sent the wagon via Mokameh instead of via Lucknow and Sitapur, but that would not have affected the protection afforded by Section 75 if the railway administrations were entitled to it.

11. It now remains to see what is the effect of execution of risk note Y by the appellant. Execution of Risk Note Y implies that the consignment was governed by the provisions of Section 75. The goods were certainly excepted goods; I have held that the consignment was not governed by the provisions of Section 75 and that is because there is no evidence that the garlands were individually worth more than Rs. 100. I do not think it would be proper to infer from the execution of Risk Note Y that the garlands were individually worth more than Rs. 100. But even if this were the effect of the execution of Risk Note Y, the deviation robbed it of all its effect as explained above.

12. The next result of this discussion is that the railway administrations were liable as bailees under Section 72. They deviated from the route. No definite finding has been given by the Courts below on the question whether there were breaches on the meter-gauge route between Kanpur and Hajipur and whether the railway administrations were justified in deviating from the booked route. It is not necessary, however, to obtain a finding on this point from them because they have both found that the railway administrations were guilty of negligence in dealing with the consignment at Kanpur and Mokameh on account of which some bangles were lost and broken. That finding is binding upon us in second appeal. The appellant had deliberately chosen the meter-gauge route from Kanpur to Hajipur because it did not involve any transhipment. It had packed the bangles into a wagon at Farrukhabad and that wagon should have gone direct to Hajipur. But the railway administrations unloaded it at Kanpur and did another unloading at Mokameh without informing the appellant that owing to the breaches, they were unable to send the meter-gauge wagon direct to Hajipur. The consignment was detained for many days at Mukameh and also at Kanpur and the railway administrations could have informed the appellant of the proposed deviation and given it an opportunity of sending servants to Kanpur and Mokameh to do the transhipment. The appellant might have even preferred waiting for a few days to the proposed deviation and might have

informed the railway administrations to wait till the breaches were repaired. The necessity of informing the consignor of the proposed deviation, particularly when the deviation involved the transhipment of goods from a smaller wagon to a larger wagon, was stressed in Kishanlal Matrumal's case, (1933 A. L. J. 855 : A. I. R. (25) 1938 ALL. 561). In that case it was also stated that a railway administration would be justified in waiting on account of breaches in the booked or usual route, but not in deviating from it. Deviation was taken to be a misconduct in B. N. Rly, Co. v. Haji Latif Abdullah, A. I. R. (24) 1987 Cal. 410 : (173 I. C. 797).

13. There is no dispute before us about the value of the lost and broken bangles. I do not allow the appellant anything on account of travelling expenses, interest, and delay. The plaintiff's counsel did not address us at all on these items of its claim as contained in the plaint. The value of the lost and broken bangles is Rs. 772-4-3. This is the amount to which the appellant is entitled.

14. The appeal is allowed and the appellant's suit is decreed for Rs. 772-4-3 with proportionate costs of all Courts.

Mushtaq Ahmad, J.

15. I agree in the order proposed.