CALCUTTA HIGH COURT

Rivers Steam Navigation Co. Ltd

Vs

Bisweswar Kundu

(Mukerji ,J.)

22.08.1927

JUDGMENT

Mukerji, J.

1. The Rivers Steam Navigation Co. Ltd. and the India General Navigation and Railway Co. Ltd. have obtained this Rule to show cause why the decree passed against them by the Small Cause Court Judge of Khulna should not be set aside.

2. Mulji Sicka and Co. dispatched six bags of mohini biri on 15th August 1925 from Jagannath Ghat to Khulna for carriage by the dispatch service of the two companies. The consignment was deliverable to Bisweswar Kundu who not having received the same instituted the suit claiming Rs. 380, which was made up of Rs. 314-8-0 as the price of goods, Rs. 31, as damages at 10 per cent., and Rs. 36, as interest, deducting a remission of Rs. 1-8-0 from the total. The suit has been decreed in full with costs.

3. The grounds urged in support of the Rule are mainly four. To deal with these grounds it is necessary to set out a few facts, which are not disputed. Enquiries were made about the goods on behalf of the plaintiff and the plaintiff not having received delivery thereof wrote a letter to the agents of the companies at Barisal who sent the following reply:

Rivers Steam Navigation Co. Ltd.

(Incorporated in England) India General Navigation and Ry. Co. Ltd.

(Incorporated in England) Barisal...Agency 5th September 1925.

No. C. Mis. 29/25/15525.

Babu Biseswar Kundu, Merchant, Khulna Bazar, Khulna.

Dear Sir, Khulna theft case.

J. Ghat to Khulna Ghat. Inv. No. 1935/35 of 15th August 1925. Your letter of 2nd September 1925.

In reference to your above, we inform you that the matter is under enquiry and the result will be intimated to you in due course.

Yours faithfully, Pro. Macneill & Co.

Sd/- Mitchel, Joint Agents.

4. It was alleged in the plaint that thereafter there was some correspondence, but we do not know what it was, and though some of it is on the record yet the same has not been proved. On the 1st April 1926, however, the plaintiff sent a. pleader's letter to the said agents. It ran in these words:

From Babu Nagendra Chandra Bhoumik, Pleader, Khulna, Dated, Khulna, 1st April 1926.

To The Agents, I. G. & R.S.N. Co. Ltd., Barisal.

Sir, Having been instructed by my client, Babu Bisweswar Kundu of Khulna Bazar, I hereby inform you that inspite of repeated demands you have not settled the claim of my said client in respect of the marginally* noted theft case.

*Khulna Godown Theft Case. J. Ghat to Khulna Ghat Invoice No. 1935/35, dated 15th Aughst 1925.

I, therefore, give you notice that, unless the claim is paid off within a fortnight from the date of receipt of this notice my client will be compelled to sue you in the civil court for realization of the price of the said lost goods together with damages.

Yours faithfully,
Sd/- Nagendra Ch. Bhoumik,
Pleader,
Judge's Court, Khulna,
1st April 1926.

5. Various defences appear to have been, taken on behalf of the defendant companies in their written statement, some of which were suggested in the cross-examination of the plaintiff's

witnesses and were denied by them. These were not pursued any further and it is not profitable to refer to them here. It is necessary only to state that the story of theft, which was alleged as having led to the disappearance of the goods, has been definitely disbelieved by the trial Court. It should further be mentioned that the letter which the plaintiff wrote to the agents at Barisal in the first instance, and which appears to have been, dated 2nd September 1925, has not been, put in evidence by either party.

6. The first contention that has been urged in support of the Rule relates to the sufficiency and validity of the notice, that is necessary to be given under Section 10, Carriers Act (3 of 1865). Much of the argument that has been advanced on this point is founded on the assumption that it was the pleader's letter of 1st April 1926 that was the notice in this case, The argument overlooks the letter of 2nd September 1925 which, though not in evidence, is a document of which the existence is admitted and indeed cannot be denied, in view of the reply that was given to it. The circumstances under which it was written have been deposed to by the plaintiff's witness Taraknath Kundu. That witness said:

I went to the godown of the steamer companies and came away for two or three days as I was informed that the articles had not arrived. Then, on 2nd September 1925, Dwarkatnath Sen, godown clerk, informed me that the goods were stolen.... On 2nd September 1925 we wrote letter to Barisal agent.

7. Section 10 of the Act provides that no suit shall be instituted against a common carrier for the loss of or injury to goods entrusted to him for carriage sinless notice in writing of the loss or injury has been given to him before the institution of the suit and within six months of the time when the loss or injury first came to the knowledge of the plaintiff. If the information that the godown clerk gave was definite enough it stands to reason to assume that the letter must have conveyed similar information. The letter, therefore, may well be treated as the requsite notice and it was given well within time. The defendants have produced the pleader's leter of the 1st April 1926 but not the letter of the 2nd September 1925. The presumption is that if produced it would have gone against them, that is to say, it would have appeared that it amounted to a notice of the loss of the goods. If, on the other hand, the information given by the godown clerk was indefinite, and if, therefore, there was no mention made of the loss in the letter of 2nd September 1925 the pleader's letter of 1st April 1926 was such a notice having made mention of "the said lost goods," "Khulna godown theft case" and "Jagannath Ghat to Kulna Ghat Invoice No. 1935 of 1925, dated 15th August 1925, though this letter was dated 1st April 1926, yet it must be regarded as within time as it was within the peculiar knowledge of the companies themselves as to when the loss took place, Radhasyam Basak v. Secretary of State [1917] 44 Cal. 16, Jugal Kishor v. G.I.P. Ry. Co. A.I.R. 1923 Al. 22, G.I.P. Ry. v. Badhemal , and they have failed to

discharge the onus that lay on them in respect of it, and also in view of the well recognized principle of suppressed fraud, a principle which will be more fully referred to in dealing with the question of limitation.

8. Both the letters were addressed to the joint agents of the two Companies at Barisal, one of them is on the record and shows that it was so addressed, the other one must also have been similarly addressed as it was the joint agents of the "Barisal Agency" who acknowledged receipt of it. Reference has been made to condition No. 18 on the back of the forwarding note which runs in these words:

No claim of any kind whatsoever in respect of this contract shall be valid unless in writing and delivered at the office of the company in Calcutta within six months from the date of any default, loss or damage in respect of which such claim arises.

9. It is urged on the basis of this condition that the notices, such as they were, were not in compliance with this condition and accordingly the plaintiff's claim is not maintainable. To deal with this contention in order to clear up the ground, it should be pointed out that while Section 10 of the Act requires notice of the loss or injury to be given, condition No. 18 speaks of the notice of any claim under the contract.

10. It has, however, not been argued that the notice of the claim that has to be lodged under this condition is any different from the notice of the loss or injury contemplated by Section 10 of the Act. If the condition were relied on in that way it would obviously have to be held to be a term in the contract by which the defendants, who are common carriers and insurers of goods, have attempted to contract themselves out of their liability for negligence and imposed upon the insured a disability to recover beyond what the statute has 'provided for and has made an inroad upon the general law by engrafting on it a limitation that a legal liability which has arisen cannot be enforced "in a Court without a demand being made on the party himself. What, however, has been argued is that the notice that was served in this case not having been delivered in" the office of the company in Calcutta, the condition has been violated and accordingly the claim is not maintainable. For companies which have such extensive business at numerous stations and on riverine routes extending all over the provinces of Bengal, Behar and Assam, a condition like this, fairly interpreted, is not at all unreasonable, for, if it is complied with, the companies may at once be put on enquiry as to the loss or injury that has occurred. Moreover, there may be cases in which a servant or agent, service on whom of a notice meant for the companies would ordinarily be sufficient as service on the companies themselves, may be the very person responsible for the loss; in which csse want of actual knowledge on the part of the companies would result in no proper investigation being held at all. That it is not "an unreasonable condition was held in British India Steam Navigation Co. Ltd. v. Hazi Mahommad Esack and Co. [1881] 3 Mad. 107.

The learned Judges who decided the case of the River Steam Navigation Co. v. Hazari Mull [1918] 27 C.L.J. 294, also expressed the same view though the dictum laid down therein was obiter in view of what was actually decided. The case of India General Navigation and Ry. Co. v. Girdhari Lal Gobardhan Das , in my opinion, has not actually decided this question. It is, unfortunate, however, that there is in existence nothing answering to the description of the office of the company at Calcutta. The offices of the agents or managing agents of the two companies are located at two different places in Calcutta. But it is argued that by reason of condition No. 1, of the forwarding note, which is in the nature of an interpretation clause, the "Company" in this case should be read in the plural as meaning the two companies separately and, therefore, condition No. 18 should be read as meaning that two notices will have to be delivered, one at each of the two offices in Calcutta. Such a condition by itself is again not unreasonable, but if this is what was meant it should have been more clearly stated. Merely because the word "company " has to be read in the plural, by virtue of condition No. 1, there is no obligation to read the word "office" in the plural as well. There is nothing to prevent the two companies although they may have their registered offices at two different places from having one joint office in Calcutta for the purpose of these notices, and there is nothing else to prevent the term being: more definitely specified in the conditions.

11. The object of the condition is to do away with the presumption of knowledge from constructive notice arising out of the actual notice served on an agent. To that extent it is a reasonable-condition, but beyond that it cannot reasonably go. It cannot be said that if the notice in writing is delivered to an agent and the agent in his turn delivers-it to the office of the company in Calcutta it will not be a sufficient compliance of the condition. In Story on Agency para. 140, it is said:

Upon a similar ground notice of facts to an, agent is constructive notice thereof to the principle himself where it arises from, or is at the time connected with the subject-matter of his agency for, upon general principles of public policy, it is presumed that the agent has communicated such facts to the principal and if he has not, still the principal having entrusted the agent with the particular business the other party has a right to deem his, acts and knowledge obligatory upon the principal, otherwise the neglect of the agent, whether designed or undersigned might operate most injuriously to the rights and interests of such party.

12. It is quite open to the parties to a, contract to stipulate that this presumption which arises upon general principles of public policy should not arise in any particular case, and that the notice instead of being served on an agent would have to be served on the principal himself. This stipulation viewed in a proper light would mean that express notice is given of the limitation of the agent's authority, and if with such knowledge a party choses to deal with the agent and not

with the principal he does so at his own peril. The question is : Do the circumstances of the present case suggest that the contracting parties were ad idem that this presumption will not arise? In the first place it must be conceded that there was no express stipulation in the contract that this ordinary presumption founded on public policy will be put aside in regard to all transactions arising out of the contract, and that there is not a word in the conditions suggesting that the authorities of the companies such as they are in any way restricted in the matter of receiving notices of claim or loss. The companies admittedly have an agency at Barisal. It is named the Barisal Agency as appears from the letter dated 5th September 1925, and the agents there style themselves as joint agents. It is not pretended that the agency is a special agency in the sense that there was delegation of authority to do a single act; it is a general agency which implies a delegation to do all acts connected with a particular trade, business or employment. In connexion with such agencies the principles to be borne in mind are well set out in Story on Agency para 127.

If a person is held out to third parties or to the public at large, by the principal, as having a general authority to act for and to bind him in a particular business or employment, it would be the height of injustice and lead to the grossest frauds, to allow him to set up his own secret and private instructions to the agent, limiting his authority; and thus to defeat his acts and transactions under the agency when the party dealing with him had, and could have, no notice of such instructions. In such cases good faith requires that the principal should be held bound by the acts of the agent, within the scope of his general authority; for he has held him out to the public as competent to do the acts and to bind him thereby. The maxim of natural justice here applies with its full force, that he, who without intentional fraud has enabled any person to do an act, which must be injurious to another innocent party, shall himself suffer the injury rather than the innocent party, who has confidence in him. The maxim is founded on the soundest ethics and is enforced to a large extent by Courts of equity.

13. As has been tersely put by an American Judge of great eminence:

The question in such cases is not so much what authority the agent had in point of fact, as it is what powers third parties had a right to suppose he possessed, judging from his acts and the acts of his principals.

14. Here the joint agents received the plaintiff's letter and in reply informed him that the matter was under enquiry and promised to intimate the result to him in due course. In sending the reply they purported to act as joint agents of the two companies in respect of the Barisal Agency. Applying the principles referred to above it irresistibly follows that the plaintiff must have understood that the notice to the Barisal agents was sufficient to discharge the burden that lay on him under Section 10, Carriers Act. Was he to assume that the notice which he had thus given

would not be communicated to the principals at Calcutta? Knowledge acquired by the principals from their agents under such circumstances would not be knowledge acquired aliunde, but from the source of its emanation, namely, the notice in writing. The defendants have nowhere said that they did not receive either of these two letters or that they did not receive them in time, and in the absence of any such express averments the ordinary presumption must be given effect to. There is no indication, that the companies ever restricted the powers of their agents in the matter of dealing with claims; and even if it be assumed that there were any such restriction the conduct of the agents in accepting the notices amounted to a representation by which the companies are bound.

15. The second ground on which the decision has been attacked is on the question of limitation. It is now well-settled that all suits against carriers in respect of goods delivered to them for carriage fall under Article 30 or Article 31, Lim. Act: Chiranji Lal Ramlal v. B.N. Ry. Co. Ltd. , Hazi Azam v. Bombay and Persian Steam Navigation Co. [1902] 26 Bom. 562, G.I.P. Ry. v. Ganpat Rai [1911] 33 All. 544, Mutsaddi Lal v. B.B. & C.I. Ry. Co. [1920] 42 All. 390, Venkatasubbarow v. Asiatic Steam Navigation Co. [1916] 39 Mad. 1. The action against the common carrier for non-delivery of goods is founded on contract because the relationship between the parties commences in contract, but it is an action in tort because the cause of action is the breach of duty of the carrier. The view of Chatterjee, J., in Radha Shyam Basak v. Secretary of State [1917] 44 Cal. 16, that where there is a breach of the written contract Article 115 applies and not Article 31, can no longer be regarded as sound. If Article 115 be held to apply, mere non-delivery was no proof of loss and the onus of proving as an affirmative fact that the non-delivery was due to loss or to some tortuous act of theirs, which would make the shorter period of limitation apply, lay on them: Mohan Singh v. Henry Couder [1883] 7 Bom. 478, British India Steam Navigation Co. v. Hazi Mohamed Eshak & Co. [1881] 3 Mad. 107, Danmul v. British India Steam Navigation Co. [1886] 12 Cal. 477. But in this they have failed, upon the finding of the learned Judge. In my view, the article applicable is 30 or 31 accordingly as the claim is regarded as one based upon loss of or injury to the goods or of non-delivery thereof. Taking it either way the suit in my opinion was within time. Treated as a suit to which Article 30 would apply, the onus of proving that the loss took place more than a year before suit and, therefore, that the suit was barred under Article 30, would lie on the defendants: Radha Shyam Basak v. Secretary of State [1917] 44 Cal. 16, Jugal Kishore v. G.I.P. Ry. Co. A.I.R. 1923 All. 22, G.I.P. Ry. Co. v, Radhemal . Moreover, a case of this nature would, in my opinion, attract the doctrine of concealed fraud. Of this doctrine, it is thus said in Pollook on Torts, 10th Edn. p. 220.

The operation of the statute of limitation is further subject to the exception of concealed fraud derived from the doctrine and practice of the Court of Chancery which, whether it thought itself barred by the terms of the statute or only acted in analogy to it, considerably modified its literal

application. Where a wrong doer fraudulently conceals his own wrong, the period of limitation runs from the time when the plaintiff discovers the truth or with reasonable diligence would discover it. Such is now the rule of the Supreme Court in every branch of it and in all causes. The same rule holds if the defendant has not actively concealed the fraud, but the plaintiff has been ignorant of it without any fault of his own.

16. For this last statement the authority cited is Oelkers v. Ellis [1914] 2 K.B. 139. Regarded as a suit to which Article 31, would apply, there having been no time fixed for delivery and there having at no time been any refusal to deliver, but, on the other hand by the letter of 5th September 1925 the companies having informed the plaintiff that the matter was being enquired into, the plaint filed on 28th August 1926 was well within time: Jugal Kishore v. G.I.P. Ry. Co. A.I.R. 1923 All. 22. As pointed out in this last-mentioned case an inflexible rule, that time begins to run from the expiry of the ordinary period of transit, need not be recognized.

17. The third point urged on behalf of the defendants is on the question of their liability. Under the Carriers Act the loss or damage of goods delivered for carriage to a common carrier is prima facie evidence of negligence and the burden to disprove negligence lies on the carrier; and loss from an unknown cause is presumptive proof of negligence: Choutmull v. Rivers Steam Navigation Co. [1897] 24 Cal. 786 affirmed on appeal by the Judicial Committee in Rivers Steam Navigation Go. v. Choutmull [1899] 26 Cal. 398. The story of the theft having been entirely disbelieved, the defendants have not explained how the loss occurred. They have, therefore, failed to discharge the burden that lay on them. Some argument has been advanced before me to show that the story of theft should have been believed. This, however, is a question of fact into which I would decline to enter in view of the very clear and strong finding of the Court below.

18. The fourth and last argument relates to the amount of the decree. So far as this argument is concerned, I do not find any materials on which a decree for damages may be passed. The allegation which forms the foundation of this part of the claim has not been proved and the learned Judge has not given any substantial reason for its sustenance. This part of the decree therefore, will have to be set aside.

19. The result then is that the rule should be discharged, subject to the modification that the decree for claim with costs will be reduced by Rs. 31 and will be for Rs. 418-8 9. For this small success the petitioners will be absolved from payment of the costs of the opposite party in this rule, it being ordered that each party will bear his or their own costs therein.