

PATNA HIGH COURT

Governor-General In Council

Vs

Gouri Shankar Mills Ltd

(M Lall C.J. Ramaswami . J.)

05.05.1949

JUDGMENT

Ramaswami, J.

1. This is an appeal by the defendant from a decree of the Additional Subordinate Judge, Monghyr. The plaintiff brought the suit on the allegation that the defendant Railway Administration had on account of their negligence failed to deliver three consignments of certain goods which had been booked for being delivered to the plaintiff at Lakhisarai. Shree Krishna Company had booked one consignment of goods at Bhagalpur on 11-8-1942. A second consignment was booked by Ramdeo Gajanand at Barhee on 13-8-1942; a third consignment by Durga Prasad Nandlal at Sultanganj on 11-8-1942. The plaintiff claimed as damages a sum of Rs. 5233-2-9 and odd together with interest. The main ground of defence was that the consignment booked at Bhagalpur and Sultanganj were duly conveyed to Lakhisarai where they were looted by a violent mob on 13-8-1942. It was stated that the third consignment was looted by a violent mob on 14-8-1942 at Barhee station. The Railway Administration pleaded that there was no negligence on their part ; that the loss of the consignments was due to circumstances beyond their control. The learned Subordinate Judge held that the Bhagalpur and Sultanganj consignments were looted by a violent mob at Lakhisarai as alleged by the defendant. But he held that the Railway Administration was negligent and the loss would not have taken place if the railway servants had taken proper care. As regards the third consignment the learned Subordinate Judge found that there was no reliable evidence that Barhee railway station was subjected to mob violence on 14-8-1942 or that the consignment was looted. He accordingly granted a decree to the plaintiff for a sum of Rs. 5233-2-9 but disallowed interest.

2. Three main questions were argued in this appeal : (1) whether the learned Subordinate Judge was right to hold that the Sultanganj and Bhagalpur consignments were looted at Lakhisarai owing to the negligence of the Railway Administration; (2) whether there was proof that the Barhee consignment was lost on account of mob violence at Barhee ; and (3) whether the entire claim of the plaintiff was not barred under Article 31, Limitation Act.

3. On behalf of the respondent learned advocate addressed the argument that the Bhagalpur and Sultanganj consignments never reached Lakhisarai, that they were not looted from the Lakhisarai goods shed on the alleged date. But this argument is untenable in face of the admission of the plaintiff's witnesses that the consignments were actually looted from the goods shed at Lakhisarai. The Subordinate Judge has found also upon the evidence that the Bhagalpur and Sultanganj consignments duly reached Lakhisarai on 13-8-42 during the night, that the consignments were unloaded and kept in the Lakhisarai goods shed on the next date. (After discussion of the evidence the judgment proceeds:)

4. On behalf of the respondent it was argued that there was no proof that the particular consignments were looted from the goods shed at Lakhisarai on the alleged date. It was maintained that the railway officers ought to have prepared a list of the consignments which were looted. But D. W. 11 stated when cross-examined, that no list was prepared as nothing was left after the loot. Learned advocate referred to *Governor-General in Council v. Kabirram*,¹ in which we had held that the onus was really on the company to prove that the particular goods were looted. But that case must be distinguished from the facts proved in the present case. In that case part of the contents of the wagon were looted by the mob and part remained of which a list had been prepared by Mr. Banerji. This list was disbelieved as Mr. Banerji had not been examined. In the present case, however, it was proved that the entire contents of the wagon had been looted and according to the evidence of D. W. 11 no list was prepared as nothing was left after the loot. On the contrary the defence evidence coupled with the admission of the plaintiff's witnesses fully supports the conclusion of the learned Subordinate Judge that the Bhagalpur and Sultanganj consignments were looted by a violent mob from the goods shed at Lakhisarai on 15-8-42.

5. In the present case the consignments were booked under Risk Note Form A duly signed by the consignor. Under this Risk Note the consignor undertakes to hold the Railway Administration "harmless and free from all responsibility for the condition in which the aforesaid goods consigned may be delivered to the consignee at destination and for any loss arising from the same except upon proof that such loss arose from misconduct on the part of the Railway Administration's servants." This clause confers exemption from liability, only in respect of the "condition" of goods at the time of delivery at destination. It does not confer immunity in a case of total non-delivery of the goods. The onus will still be on the Railway Administration to prove that they took as much care of the consignments bailed to them as a man of ordinary prudence of his own goods of the same quality and value under similar circumstances.

6. Under Section 72, Railways Act, the responsibility of railway administration is that of a bailee under Sections 151 and 152, Contract Act. The Railway must take such care of the goods as a man of ordinary prudence would take of his own goods of the same quality and value under similar circumstances. There are authorities to the effect that the loss or damage of goods entrusted to a bailee is prima facie evidence of negligence and the burden of proof, therefore, to disprove negligence lies on the bailee and in this burden lies also on the Railway Administration

in the absence of special circumstances to the contrary. In *Surendra Lal v. Secretary of State*², the plaintiff had made over to railway 250 bundles of tobacco for delivery to Calcutta. In course of transmission the goods were destroyed by a severe cyclone while being carried on a flat in river Padma. Sir Ausutosh Mookerjee observed that when goods were not delivered to the consignee at the place of destination, the plaintiff need not prove how the loss occurred. The burden lay upon the bailee to prove the existence of circumstances which exonerated him from liability for the loss. Sir Asutosh Mookerjee relied upon two cases : Trustees of *the Madras Harbour v. Best & Co*³. In *River Steam Navigation Co. v. Choutmull*,⁴ the Judicial Committee had previously adopted the view. In that case jute properly put on board on one of the appellants' vessels took fire and was consumed. The respondents claimed damage for non-delivery of 432 drums of jute. The judicial Committee held that under the Carriers Act the appellants would have been exempt from liability if they had proved (the onus being on them) that there was no negligence on their part, but that on the evidence they had failed to exonerate themselves. In *Flannery v. Waterford and Limerick Railway Co*⁵., the plaintiff sustained injuries in consequence of a portion of the train in which she was travelling, having left the rails, and the railway, the engine and the carriages were under the defendants' management. The Court held that the fact of the accident was sufficient evidence to cast upon the defendants the burthen of showing that there was no negligence on their part; and that as they declined to afford any explanation of the course of the accident, there was a case for the plaintiff proper to be submitted to the jury. In *Scott v. London Docks Co*⁶., Erle C. J., has well stated the principle :

"There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

7. In the present case the Subordinate Judge has found that the consignments were looted on account of the negligence of the Railway Administration. But the reasoning is extravagant and the conclusion cannot be sustained. The Subordinate Judge states that the bazar at Lakhisarai was close to the railway station. He considers that on 14-8-42 the railway authorities should have ascertained who were the consignees of the goods lying in the goods shed and should have issued a general notice of beat of drum to the traders in the bazar. He states:

"the station-master if he had so liked could have saved the properties with the help of his staff and the traders in the bazar."

But there is sufficient evidence on the record to indicate that the loot of the consignments could not have been prevented by any reasonable precaution on the part of the railway authorities. [After discussion of evidence the judgment proceeds.

8. In the present case it is manifest that the consignments were looted in the circumstances over which the Railway Administration had no control. There is no proof of negligence on the part of the Railway Administration. On the contrary there is evidence that the Railway Officers had taken as much care for the consignments as a man of ordinary prudence would have taken of his own goods under similar circumstances. As regards the Bhagalpur and Sultanganj consignments it must, therefore, be held that the plaintiff is not entitled to any decree against the Railway Administration.

9. As regards the Barhee consignment the case is, however, different. For the defendant it was alleged that the consignment was looted by a riotous mob on 14-8-42 from a wagon in Barhee station. The Stationmaster and Assistant Station-master (P. Ws.-1 and 5) gave oral evidence of the alleged loot. Exhibit A is the report of the Station-master but the learned Subordinate Judge rightly refused to place any reliance upon it because the original diary was not produced and no explanation was given for its non-production. Three witnesses on behalf of the plaintiff (P. Ws. 6, 9 and 10) denied that any loot took place at Barhee. Upon the evidence the learned Subordinate Judge rightly held that the Railway Administration has not proved the loss of the consignment. As already stated the non-delivery of the consignment would be prima facie evidence of negligence. No proof has been offered by the railway company to rebut this presumption. With reference to the Barhee consignment the plaintiff is, in my opinion, entitled to a decree against the defendant.

10. On behalf of the appellant learned advocate addressed the argument that the whole suit was barred by Article 31, Limitation Act. There is admitted evidence that till December 1942 the Chief Commercial Manager had stated that special enquiry was being made and that he would send a definite reply shortly. The plaintiff originally brought the suit on 16-9-43 with respect to all the consignments. On 15-11-44 the plaintiff withdrew the suit with the leave of the Court to sue afresh on the same cause of action. The reason was that the suit had been filed within two months of the service of notice under Section 80, Civil P. C. The plaintiff instituted the present suit on 16-11-1944. Upon these facts it is patent that under Section 14, Limitation Act, the plaintiff is entitled to exclude the period during which the previous suit was pending in Court. In this context reference may be made to *Hem Chander v. Kali Prosunno*⁷, In that case the facts were, that in 1890 a suit was brought against certain talukdars claiming to enhance the rent and to recover rent at an enhanced rate for a particular year. The first prayer was allowed but the second claim was rejected upon the ground that it was premature. Five years thereafter the plaintiff brought a suit to recover, inter alia, rent at the enhanced rate for the same year. The Subordinate Judge held that this claim was barred by res judicata. In appeal, the High Court did not accept this view but held that it was barred by limitation. The Judicial Committee held that there was no bar of limitation. They observed:

"In the opinion of their Lordships the proceedings in the earlier suit stayed the operation of the law of limitation; and as the appellant claimed the arrears of 1298 in that suit, but

his claim was then disallowed as premature he is now entitled to the benefit of the decree of enhancement and to recover the arrears at the enhanced rate."

Reference may also be made to the recent case *Lal Bihari Lal v. Beni Madhab Khetri*, F. A. No. 389 of 1946 : (A. I. R. (36) 1949 Pat. 293 F. B.) in which upon similar facts the Full Bench held that the plaintiffs were entitled to invoke the exception under Section 14, Limitation Act. The objection of the appellant that the suit is barred must be overruled.

11. For the reasons already stated I hold that the plaintiff is not entitled to a decree as regards the Bhagalpur and Sultanganj consignments but he is entitled to a decree with respect to the Barhee consignment, viz., a sum of Rs. 2,104-1-0 with proportionate costs and interest pendente lite at 6 per cent. per annum.

12. To this extent I would alter the decree of the trial Judge and allow this appeal with proportionate costs.

Manohar Lall, J.

13. I agree. I only wish to observe that the plaintiff cannot be non-suited on limitation because he has come too soon and not too late. See *Mt. Phulbas Kunwar v. Jogeshur*,⁸) and *Hem Chander v. Kali Prosunno*⁹, I would allow relief to the plaintiff under Section 14, Limitation Act in the circumstances of the case.



Cases Referred.

127 Pat. 151: (A. I. R. (35) 1948 Pat. 345)
225 C. L. J. 37 : (A. I. R. (5) 1918 Cal. 892)
322 Mad. 524 and *Sesham Patter v. Moss*,(17 Mad. 445)
4 26 I. A. 1 : (26 Cal. 398 P. C.)
5Ir. R. 11 C. L. 30
6(1865) 3 H. & C. 598 at p. 601 : (34 L. J. Ex. 220)
730 I. A. 177: (30 Cal. 1033 P. C.)
83 I. A. 7 at p. 25 : (1 Cal. 226 P.C)
930 I. A. 177: (30 Cal. 1033 P. C.)