

RAJASTHAN HIGH COURT

Bharat Kumar

Vs.

Union of India

S.B. Civil First Appeal No. 14 of 1988

(A.C. Goyal, J.)

19.05.2004

JUDGMENT

A.C. Goyal, J.

1. This first appeal is preferred by the plaintiffs against the judgment and decree dated 26.9.1987 whereby learned Additional District Judge No. 1, Kota, dismissed the civil suit No. 50/1983.

2. The relevant facts in brief are that the plaintiffs filed a suit on 2nd April, 1983, for recovery of Rs. 18,500/- with the averments that in compliance of the orders of the plaintiffs, M/s. Bhatia Stones Company, Ramganjmandi, district Kota, booked polished stones worth Rs. 9901.81 with the defendant Railway, vide Railway Receipt No. 334787 on 7.4.1990. The delivery of the goods was to be given to the plaintiffs at Bombay, but the same were not delivered by the defendants. The plaintiffs informed the defendants vide letters dated 1.6.1980 and 17.7.1980 and thereafter served a notice under Section 80 C.P.C. on 25.8.1990 vide registered post, which was received but with no result. The plaintiffs prayed for decree of the suit amount inclusive of interest at the rate of 18% p.a.

3. The defendants appeared in the Court but no written statement was submitted. The trial court recorded the statement of the plaintiff Bharat Kumar and vide impugned judgment dismissed the suit on the grounds that the plaintiffs have failed to prove that it is a registered partnership firm and service of Notice under Section 80 C.P.C. is also not proved and Notice under Section 78(B) of the Railway Act (hereinafter referred to as the 'Act') was not given. I have heard learned counsel for the appellants. Following points of determination arise in this appeal :

"(1) Whether Section 69 of the Indian Partnership Act, 1932 (for short the 'Act 1932') is applicable in the instant case ?

(2) Whether service of Notice under Section 80 C.P.C. was proved ?

(3) Whether Notice under the Indian Railway Act was necessary in view of the notice under Section 80 C. P.C. ?"

FIRST POINT

According to Section 68 of the Act 1932, a certified copy of an entry relating to a firm in the Registrar of Firms may be produced in proof of the fact of the registration of such firm, and of the contents of any statement, intimation or notice recorded or noted therein. The plaintiffs did not produce certified copy of the entry made in the Register of Firms regarding its Registration. Section 69 of the Act 1932 provides for the effect of non- registration. Sub-sections (1) and (2) of Section 69 are relevant, which are as under:

"69. *Effect of non-registration.* - (1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firms.

(2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm."

It was submitted by the learned counsel for the appellants that the claim for the damages made by the plaintiffs has not arisen from a contract with the defendants. He referred the provisions of Section 93 of the Railways Act, 1989 (Section 73 of the Indian Railways Act, 1890) and contended that responsibility of the defendant railway administration to pay damages on account of non-delivery of the goods is statutory. Reliance was placed upon *Kerala ArecanutStores v. M/s Ramkishore and Sons and another*,¹ and *M/s HaldiramBhujawala&Anr. v. M/s. Anand Kumar Deepak Kumar and another*,²

4. I have considered the submissions. The Provisions of Section 73 of the Act 1890

and Section 93 of the Act 1989 are the same. Section 93 of the Act 1989 being relevant is reproduced here as under :

"93. *General responsibility of a railway administration as carrier of goods.* - Save as otherwise provided in this Act, a railway administration shall be responsible for the loss, destruction, damage or deterioration in transit, or non-delivery of any consignment, arising from any cause except the following namely :

- (a) act of God;
- (b) act of war;
- (c) act of public enemies;
- (d) arrest, restraint of seizure under, legal process;
- (e) order or restrictions imposed by the Central Government or a State Government or by an officer or authority subordinate to the Central Government or a State Government authorised by it in this behalf;
- (f) act or omission or negligence of the consignor or the consignee or the endorsee or the agent or servant of the consignor or the consignee or the endorsee;
- (g) natural deterioration or wastage in bulk or weight due to inherent defect, quality or vice of the goods;
- (h) latent defects;
- (i) fire, explosion or any unforeseen risk :

Provided that even where such loss, destruction, damage, deterioration or non-delivery is proved to have arisen from any one or more of the aforesaid causes, the railway administration shall not be relieved of its responsibility for the loss, destruction, damage, deterioration or non-delivery unless the railway administration further proves that it has used reasonable foresight and care in the carriage of the goods."

A careful reading of the above provisions makes it clear that the Railways are now under the greater responsibility and are liable for loss of non-delivery of the goods except under certain circumstances provided under Section 93 of the Act and thus the

liability of the Railway as carrier of goods under Section 93 of the Act and thus the liability of the Railway as carrier of goods is that of 'insurer'. The Kerala High Court has held that even an unregistered firm can maintain the suit by partner for recover of money on dishonour of cheque endorsed in favor of the firm as the cheque was issued under the Negotiable Instruments Act providing for the rights and obligations of parties to the negotiable instruments and thus provisions of sub-sections (1) and (2) of Section 69 of the Act 1932 are not applicable. Similar view was taken by Hon'ble Apex Court in the case of M/s. HaldiramBhujawala and another (supra). In the instant case the plaintiffs' claim for damages did not arise from a contract with the defendants. Rather the defendants Railway's liability for compensation of damages arises under Section 93 of the Act 1989. Thus the first point is accordingly decided in favor of the plaintiffs.

SECOND POINT

It was pleaded in para 6 of the plaint that Notice under Section 80 C.P.C. dated 25.8.1980 was sent to the defendants by registered post and the same was received by the General Manager-defendant No. 2. It is significant to say here that this fact was not denied by way of written statement.

5. According to the statement of P.W.1 Bharat Kumar, Ex.1 is the copy of the Notice. It was admitted by him that except it, no other notice was given. P.W.1 Bharat Kumar was not cross-examined on the point of service of Notice Ex.1. A perusal of the Notice Ex.1 and the statement of P.W.1 Bharat Kumar clearly goes to show that this notice was sent by registered post and there was no justification for the trial court to hold that service of this notice has not been proved because there was no reason not to rely upon unrebutted statement of P.W.1 Bharat Kumar. Thus, this point is also decided in favour of the plaintiffs-appellants.

THIRD POINT

6. Section 78(B) of the Act 1890 and Section 106 of the Act 1989 are similar. According to these provisions before filing a claim of compensation, it is necessary to serve a notice under these provisions with six months from the date of the delivery of the animals or goods for carriage by railway. The Notice under Section 80 C.P.C. was served upon the defendants within a period of less than six months from the date of booking the goods with the railway. Learned counsel for the appellants contended that the purpose of the notice is to afford an opportunity to the opposite party to consider the claim of the plaintiffs and this purpose was served vide Notice under Section 80

C.P.C. and mere non-mentioning of Section 78(B) of the Act 1890, is of no consequence.

7. Having considered the above submissions, I am of the considered view that the submissions made by the learned counsel for the appellants should be accepted. The purpose of the Notice is to give an opportunity to the opposite party to consider the claim of the plaintiff. The defendants in the instant case did not even reply the notice given by the plaintiffs under Section 80 C.P.C. Mere label of the particular section/provision does not make any adverse effect on the merits of the case as observed while deciding Point No. 2 that Section 80 C.P.C. was served upon the defendants. The defendants not only gave any reply of the notice but also failed to file any written statement and further none appeared for the respondents in this appeal also and it shows that the concerned officers of the defendants railway dealing with this case had no concern with this case. Thus this point is also decided in favor of the appellants.

8. Since the trial Court did not consider the case on merits at all, therefore, it would be appropriate to remand the case to the trial court to decide the same on merits with regard to damages.

9. In the result, this appeal is allowed. The impugned judgment and decree dated 26.9.1987 is set-aside and the case is remanded to the trial court for decision on merits in the light of the observations made here-in-above. The parties shall appear before the trial court on 7th July 2004 and the trial Court shall make every effort to decide this case preferably within three months from the date of first appearance in the Court.

Appeal allowed.

Cases Referred.

1. AIR 1975 Ker 144
2. AIR 2000 SC 1287