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Court : Kolkata

Decided On : May-24-1966

Reported in : AIR1967Cal133

Judge : P. Chatterjee, J.

Acts : Railways Act, 1890 - Sections 73, 74 and 76; ;[Evidence Act, 1872](#) - Section 114; ;[Code of Civil Procedure \(CPC\) , 1908](#) - Section 115; ;[Constitution of India](#) - Article 227

Appeal No. : Civil Rules Nos. 4505-07 of 1965

Appellant : Union of India (Uoi) and anr.

Respondent : Mamchand Agarwalla and anr.

Advocate for Def. : Haripada Saha, Adv.

Advocate for Pet/Ap. : Bhabesh Narayan Bose, Adv.

Judgement :

ORDER

P. Chatterjee, J.

1. This is a petition under Section 115 of the Code of Civil Procedure against the judgment and decree passed by the Court of appeal below in suits for money. The

plaintiff is a dealer in mangoes. The plaintiff consigned certain baskets of mangoes from Eklakshi to Tinsukia and certain other baskets from Katihar to Tinsukia. The normal time for delivery of a parcel consignment is about three to four days; but the plaintiff urged that due to wilful negligence and gross misconduct of the defendant or of his servants the parcels were carried by goods train and reached Tinsukia four days later than the normal time of delivery. The plaintiff filed the suit after serving usual notices. The defendant however challenged the statement regarding delay. The defendant also challenged the statement that the mangoes in the baskets were green and the defendant's case was that there was no negligence or misconduct of his servants and the mangoes were damaged because they were tendered for despatch in a quite ripe condition. The defendant claimed protection under Section 73 (g) and Section 74 of the Indian Railways Act. In the trial Court the defendant did not challenge that the consignments were not carried by goods train. The trial Court found that consignments were booked at owner's risk rate and the plaintiff was bound to prove negligence or misconduct of the defendant and the plaintiff could not prove that the defendants were negligent in carrying consignment by goods train. The trial Court further held that in view of exhibits 1 to 1 (B) the plaintiff was estopped from challenging the damage certificates. The trial Court further found that the claim of the plaintiff was inflated and that the notices were good; but the suit was dismissed as there was no negligence on the part of the Railway Administration. Against that decision, an appeal was filed.

2. The appeal Court found that there was no estoppel and further held that the parcel being carried by 901. Up train which is an Express Parcel Train between Katihar and Tinsukia the question of sending the parcel by goods train does not arise. The appeal Court further found that documents were called for from the defendants and those documents were not produced and therefore there was withholding of the documents. The appeal Court relied on Section 76 of the Indian Railways Act, and so it was the duty of the Railway administration to prove that the delay and detention was caused not due to the negligence and misconduct of the Railway Administration; but it found that the Railways not having produced the necessary documents presumption should be made as against the Railways. It further held that the Railway Administration was not absolved from the liability and

the appeal court granted relief. The substantial point in this case is whether the delay caused in delivery was due to negligence or misconduct of the Railway authorities. The trial court referred to Section 74 of the Indian Railways Act and found it was for the plaintiff to prove positively that there was delay due to misconduct or negligence of the Railway Administration. Whereas the appellate court found that Section 76 would govern the case and therefore it was for the Railway Administration to prove that the delay or detention arose without negligence or misconduct of the Railway Administration. The first question, therefore, would be whether the case would be governed under Section 74 or under Section 76 of the Indian Railways Act.

3. It is urged by Mr. Bose on behalf of the petitioner Railway Administration that Section 74 would govern the case because the goods were carried at owner's risk rate. There is no dispute that the goods were carried at owner's risk rate. Section 74 (3) provides as follows:

'When any goods are carried at the owner's risk rate, then, notwithstanding anything contained in Section 73, the Railway administration shall not be responsible for any loss, destruction, damage, deterioration or non-delivery in transit of such goods from whatever cause arising, except upon proof that such loss, destruction, damage, deterioration or non-delivery was due to negligence or misconduct on the part of the railway administration or of any of its servants'

In this case the goods were delivered for carriage at the owner's risk rate. There was damage to the goods or there was at least deterioration of the quality of the goods in transit and therefore the railways was not responsible whatever may be the cause for such deterioration unless there was proof that such deterioration was due to negligence or misconduct on the part of the railway administration. The findings are that there was delay and on that finding of fact the question is whether deterioration took effect because of the delay. If the finding on that point is that the deterioration took place because of delay even then the plaintiff has to prove that such delay was caused due to negligence or misconduct on the part of the railway administration. Therefore, under section 74 (3) it was the responsibility of the plaintiff to prove positively to a court of fact that this deterioration was due to

negligence or misconduct on the part of the railway administration or any of its servants. In order to prove that there was negligence or misconduct the plaintiff may call upon the railway administration to produce such evidence as he thinks fit and the court may at the instance of the plaintiff direct the defendants to produce such evidence. If the defendant does produce the evidence the court will admit that as evidence adduced on behalf of the plaintiff and then come to a finding of fact as to whether there was such negligence or not. If the defendant however does not produce that evidence, the court will consider as to whether the evidence called for was evidence relevant for the purpose of proving negligence or misconduct. If the court finds that evidence called for would be relevant for the purpose of proving a case of negligence or misconduct, the court will hold that if evidence was produced it would have gone against the defendant and the defendant not having produced the evidence must be considered to have withheld that evidence. If further the evidence called for was not relevant for the purpose of proving a case of negligence or misconduct, non-production of such evidence would not be withholding of evidence relating to negligence or misconduct. It may be withholding evidence with regard to some other matter. What I mean to say is whenever any relevant document is called for and whenever that document is not produced the court may presume that the railways withheld evidence. The evidence called for must be relevant for the purpose of proving negligence and misconduct if the relevant evidence is called for and such relevant evidence is withheld then the court may presume that if such evidence had been produced by the defendant, it would have gone against the defendant. The appeal court in this case has not even considered what documents were called for and whether those documents would be relevant for the purpose of proving a case of negligence or misconduct. But the primary question is whether Section 74 of the Indian Railways Act applies or Section 76 of the Indian Railways Act applies.

4. It is urged by the learned Advocate for the respondent that Section 76 applies. That section provides as follows:

'A railway administration shall be responsible for loss, destruction, damage or deterioration of goods proved by the owner to have been caused by delay or detention in their carriage unless the railway administration proves that the delay

or detention arose without negligence or misconduct on the part of the railway administration or of any of its servants.'

Therefore, it is urged Section 76 would apply. I understand the argument of the learned Advocate that Section 74 deals with cases of goods carried at owner's risk rate whereas Section 76 is a special provision relating to delay or detention. Hence, the special provision would exclude the general provision and hence Section 76 would exclude Section 74, I am afraid I cannot accept that argument. Section 74 specifically says in Sub-section 3 that the said section would be applicable notwithstanding anything contained in Section 73. Section 73 is the section which deals with the general responsibility of railway administration as carrier of animals and goods. Therefore, section 73 is the general section relating to the responsibility of a railway administration as a carrier of animals and goods. To this section there is an exception and that exception is in section 74, Therefore, Section 74 is the general provision to which there is an exception by Section 73. Therefore, the special provision in Section 74 will exclude the general provision in Section 73; but that does not answer the argument of the learned Advocate for the opposite party. Therefore, we have to look at the Section 73 more carefully. Section 73 is as follows:

'Save as otherwise provided in this Act, a railway administration shall be responsible for the loss, destruction, damage, deterioration or non-delivery, in transit, of goods delivered to the administration to be carried by the railway, arising from any cause except the following.'

Therefore, except with regard to cases included in exception there is the general responsibility on the railway for loss, destruction, damage, deterioration arising from any cause. After Section 73, different causes for damage are considered under SECTIONS 75 (A), 76, 76 (A), 76(B) and 76(C). Section 75-A refers to cases where goods are carried by open vehicles. Section 75 considers the cases where responsibility arises for delay or detention. Section 76-A relates to destruction or deterioration because of goods being carried at a deviated route. Hence, Section 76 is one of the sections which deal with the causes for destruction, damage or deterioration of the goods. Therefore, Section 76 really

deals with one particular case of deterioration where there is a general responsibility under Section 73. But when there is no general responsibility under Section 73, Section 76 will not come into operation. Therefore, the operation of Section 76 is controlled by Section 73 and as Section 73 is excluded by Section 74, Section 74 would apply rather than Section 76. Therefore, the appeal court was wrong in referring to Section 76 and in relying upon that section, the appeal court should have considered Section 74 and then should have found whether the plaintiff was able to prove negligence or misconduct.

5. Mr. Bose, on behalf of the railway administration, says that the plaintiff has given no evidence. If the plaintiff has called for documents from the defendants and the defendants have produced those documents, those documents should have been the plaintiff's evidence. If having called for those documents the plaintiff was unwilling to prove those documents the defendants may take appropriate steps under the Indian Evidence Act. But in order to prove the case the plaintiff may rely not only upon the evidence produced but also upon the evidence which the plaintiff calls upon the Defendant to produce and which the defendants may produce provided that evidence is relevant for the purpose of proving misconduct or negligence on the part of the railway administration. I must, therefore, hold that the appellate court was wrong deciding on the basis of Section 76. The appellate court should have relied upon Section 74. But at the same time it should have considered the effect of non-production of the evidence provided that evidence was relevant for the purpose of proving a case of negligence or misconduct. The appellate court has considered that the defendants withheld evidence but has not considered whether such evidence called for was relevant or not for the purpose of proving a case of misconduct or negligence. I am, therefore, inclined to set aside the judgment and decree of the court of appeal below. But there is one difficulty. The petition is under Section 115 of the Code of Civil Procedure and there is no error within the meaning of Section 115 of the Code of Civil Procedure. There is no doubt that the court had jurisdiction to decide the appeal on facts and on law. There is further no doubt if the court decided erroneously on facts or on law that would not affect any question of jurisdiction of the court. It has been urged that the court acted illegally but in this case what the court did was that it decided illegally. When the court acted in the proceeding or in other words when the court was

taking particular steps in the suit, the court acted in the suit and there was no irregularity in such acting of court. Therefore, it is not a case which comes under section 115(c). The decisions of the Judicial Committee and that of the Supreme Court are numerous. In the case of *Keshardeo v. Radhakissen*, : [1953]4SCR136, the High Court sent the matter back on remand to the trial court exercising powers under Section 115(c) of the Code of Civil Procedure. The Supreme Court held as the trial court decided the matter may be erroneously or rightly the High Court would have no powers under Section 115(c) of the Code of Civil Procedure. But I have powers both under Section 115 of the Code of Civil Procedure or under Article 227 of the Constitution and I find that the court below committed an error of law which affected the entire decision in the case and there was an error in law on the face of the records therefore I am inclined to hold that I have powers under Article 227 to deal with the matter.

6. I, therefore, set aside the judgment under that power and send the matters back to the lower appellate court to decide it in accordance with law and in accordance with the observation aforesaid. The Rules are made absolute. No order for costs.

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