

Basanti Bastralaya Vs. River Steam Navigation Co. Ltd. and ors.

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Court : Kolkata

Decided On : Aug-22-1986

Reported in : AIR1987Cal271,[1989]66CompCas270(Cal)

Judge : Pratibha Bonnerjea, J.

Acts : [Contract Act, 1872](#) - Section 56

Appeal No. : Suit No. 2084 of 1968

Appellant : Basanti Bastralaya

Respondent : River Steam Navigation Co. Ltd. and ors.

Advocate for Def. : G.C. Law, ;Pinaki Ghosh, ;Ruma Pal, ;Reba Roy, ;Dipak Basu and ;D. Shome, Advs.

Advocate for Pet/Ap. : T.K. Mukherjee and ;Girish Ch. Gupta, Advs.

Disposition : Suit dismissed

Judgement :

Pratibha Bonnerjea, J.

1. This is a suit filed in August 1968 for recovery of damages of Rs. 24,333.42 for non-delivery of goods by the defendants, a decree for the said sum against the defendants in favour of the plaintiff or an enquiry into the damages and decree for

the sum found due to the plaintiff against the defendants, interest and costs etc.

2. The defendant No. 1 was a common carrier and used to carry goods by inland navigation for reward. The defendant No. 1 received 4 bales of Mill made cotton cloth weighing 763 kilograms on 13-8-65, 4 bales of Mill made cotton cloth weighing 5 quintals and 98 kilograms on 14-8-65 and one bale of Mill made cotton cloth on 28-8-65 weighing one quintal 38 kilograms from the plaintiff on board the vessel 'Perim' for carriage to Silchar in Assam and issued invoices No. 1529R Rt. No. 21, No. 1587 R.Rt. No. 14 and 2091 R.Rt No. 21 and the forwarding notes Nos. 782 dated 13-8-65, 676 dated 14-8-65 and 445 dated 28-8-65 in respect of the same goods and agreed to deliver the goods to the plaintiff on order. At all material times, the plaintiff was and still is the owner of the said goods. It is alleged in the plaint that the defendant No. 1 in breach of its duty as a common carrier failed and neglected to deliver the said goods to the plaintiff at the destination. The value of the goods was Rs. 24,858/83p. The defendant No. 1 is liable to compensate the plaintiff in respect of the said loss or damages suffered by the plaintiff. Notice under Section 10 of the Carriers Act was duly served on the defendant No. 1 in time. The said goods were insured against risk with the original defendant No. 2 under three different Marine Insurance Policies, all dated 13-9-65. Due notice of nondelivery of the said goods was served on the original defendant No. 2 in respect of the aforesaid three consignments in time. The defendant No. 2 is liable to pay the value of the said goods to the plaintiff under the said three policies for total loss of the goods suffered by the plaintiff. The defendant No. 3 was added as a party defendant on the allegation that it had been authorised by the Union of India to settle the claims of the parties whose properties had been detained by the enemy country. On or about 3-6-68, the plaintiff caused a notice to be served under Section 80 of the Code of Civil Procedure on the defendant No. 3 claiming the aforesaid sums as the value of the goods. By an order dated 3-5-1967, passed prior to the institution of the present suit, the defendant No. 1 was amalgamated with the defendant No. 1A under a scheme whereby the defendant No. 1A look upon itself all the assets and liabilities of the defendant No. 1 including its liability to the plaintiff in respect of the said loss. By a letter dated 15-5-80, the plaintiff was informed that the business of the original defendant No. 2 had been taken over by the defendant No. 2A along with all its assets and liabilities after the

nationalisation of its General Insurance business and as such the defendant No. 2A would pay the liability, if any, of the defendant No. 2 to the plaintiff under the said three policies. Under the circumstances, the plaint had to be amended four times by four orders dated 6-6-72, 1-8-80, 13-8-81 and 10-8-82 to bring all the parties to the suit on record. According to the plaintiff, in spite of demands, the defendants in this suit failed and neglected to pay to the plaintiff the said sum of Rs. 24,858.83 along with interest thereon from 13-8-66 to 12-8-1968 or any portion thereof.

3. During hearing, the defendants Nos. 1 and 1A, 2A and 3 appeared through their respective counsel but the defendant No. 3 did not contest the suit nor the plaintiff proved its claims against the defendant No. 3. The other appearing defendants contested the suit.

4. In the written statement filed by the defendant No. 1, it alleged that it had stopped carrying on business after 3-5-67 by virtue of the order of amalgamation by this Court on 3-5-67 and the defendant No. 1A stepped into its shoes and is answerable for the plaintiff's claim, if any. It further alleged that during the voyage in August/September 1965 hostility broke out between India and Pakistan and at that time the said vessel was within the territory of East Pakistan and as such the same along with its cargo was seized and/or detained by the Pakistan Government as a result whereof the contract of carriage was frustrated due to impossibility of performance in terms of the special contract between the parties. The defendant No. 1 was not liable for the alleged loss as the same was caused by the action of the State's enemies. It also alleged that no notice of loss was lodged by the plaintiff with the defendant No. 1 within 6 months from the date of the alleged loss in terms of the agreement between the parties and as such the claim of the plaintiff is not maintainable. Alternatively, it alleged that the plaintiff as a creditor should have intervened in the scheme of amalgamation sanctioned by this Court for recovery of its alleged dues. The defendant No. 1 denied its alleged liabilities for the sum claimed by the plaintiff or any portion thereof.

5. The defendant No. 1A filed its written statement and alleged that it was incorporated on 16-2-67 and had no knowledge of the alleged transactions

mentioned in the suit and did not admit the same. It further alleged that an arrangement was arrived at between the defendant No. 1 and its creditors and a scheme was framed for payment to the creditors which was sanctioned by this Court on 3-5-67. The defendant No. 1A denied that it had taken over the alleged liability, if any, of the defendant No. 1 to the plaintiff in respect of its alleged claims in the suit. The defendant No. 1A denied its liability to the plaintiff in its entirety.

6. The defendant No. 2 in its written statement denied the alleged transactions or the allegations that the defendant No. 1 failed to deliver the alleged goods. This defendant also denied that the plaintiff was the owner of the alleged goods. The defendant No. 2 relied on the three marine policies for ascertaining the terms, scope and effect thereof thereby admitted their existence and genuineness. It also admitted having received a notice of demand from the plaintiff for its alleged claims.

7. The defendant No. 2 also relied on the exemption clauses contained in the three marine policies providing -- 'The risk under the policy will cease if the goods are detained in East Pakistan Water'. According to the defendant No. 2 the alleged loss, if any, cannot be recovered from it. It is alleged that the plaintiff had no cause of action against this defendant. The defendant No. 2A has adopted the written statement filed by the defendant No. 2.

8. The defendant No. 2 filed its written statement disputing each and every allegation in the plaint. The defendant No. 3 further stated that during Indo-Pakistan conflict in August/September 1965, the Government of Pakistan seized the goods and properties belonging to Indian citizens. By a Press Note, the Government of India advised those Indian citizens to register their respective claims with the Custodian of Enemy Property. Pursuant to that Press Note, on or about 2-12-65, the plaintiff filed with the Custodian of Enemy Property, Bombay a claim in respect of the goods alleged to have been seized by the Pakistan Government. It was made clear in the Press Note that such registration would not amount to any acknowledgment of alleged right of the claimant. The defendant No. 3 denied and disputed the sufficiency or validity of the notice Under Section 80 of the C.P.C. served by the plaintiff. The defendant No. 3 denied the alleged claims

of the plaintiff and stated that the suit was bad for non-joinder of the necessary party -- the Custodian of Enemy Property. According to the defendant No. 3, the plaintiff has no cause of action against the defendant No. 3.

9. On the basis of the pleadings of the parties, the following issues were framed for decision : --

1. (a) Was the vessel concerned within the territory of Eastern Pakistan in August/September 1965 and the vessel including the cargo was detained by the Government of Pakistan as alleged in paragraph 3(a) of the Written Statement of the defendant No. 1?

(b) If so, did the contract become frustrated or void on account of the aforesaid facts as alleged in paragraph 3(c) of the Written Statement of the defendant No. 1?

2. Was there any special contract between the parties exempting the defendant No. 1 from the liability on account of the facts alleged in paragraph 4(a)(i) of the Written Statement of the defendant No. 1?

3. Is the suit maintainable by reason of non-service of the notice under Carriers Act as alleged in paragraph 9 of the Written Statement of the defendant No. 1?

4. Is the plaintiff debarred from filing of the suit against the defendant No. 1 on account of the facts as alleged in paragraph 5 of the Written Statement of the defendant No. 1?

5. Was the defendant No. 2A absolved from liability under the Insurance contract by virtue of the terms of the contract as alleged in paragraph 10 of the Written Statement of the defendant No. 2?

6. Has the plaintiff any cause of action against the defendant No. 1A?

7. To what relief, if any, is the plaintiff entitled?

10. The plaintiff called one Paresh Chandra Sana, a partner of the firm and one Ram Gopal Mohta as its witnesses. No oral evidence was adduced on behalf of

any of the contesting defendants.

11. The defendant No. 1 in its written statement has admitted the transactions mentioned in the plaint and has relied on a special contract between the parties relating to the said transaction exempting the defendant No. 1 from all liabilities due to delay, damage or loss on account of any act of the State's enemies during transit. It is also the case of the defendant No. 1 that the said vessel along with its cargo was seized by the ' Pakistan Government during Indo-Pakistan ; hostility in August/September 1965. In view of this clear admission of the defendant No. 1 in respect of the transactions mentioned in the suit, the denial of these facts in the written statement of the defendant No. 1A has hardly any substance. Similarly, the denial of the transactions between the defendant No. 1 and the plaintiff by the defendant No. 2 must be rejected in view of the facts that in paragraph 8 of its written statement, the defendant No. 2 admitted having issued three marine policies mentioned in the plaint. The defendant No. 2 is relying on the terms of the said three marine policies. Unless the plaintiff and the defendant No. 1 had the said three transactions, the question of issue of three marine policies by the defendant No. 2 would not arise. The plaintiff has added the defendant No. 3 to settle the claim of the plaintiff in respect of the goods seized by the Government of Pakistan as mentioned in paragraph 10 of the plaint. Reading the plaint as a whole, it becomes clear that the seizure of the goods by the Pakistan Government is admitted by the plaintiff but the plaintiff has made the defendant Nos. 1 and 1A and 2A as defendants along with the defendant No. 3 as it is in doubt as to from whom the damage or loss could be recovered. The transactions are also independently proved by the three bills of lading and/or forwarding notes being Ext. H dated 13-8-65, 14-8-65, 20-8-65. The insurance of the cargo with the defendant No. 2 is proved by the covering notes being Exts. A, B and C all dated 6-9-65. The three marine policies are Ext. F collectively. In that view of the matter, the defendant Nos. 1, 1A and 2A are bound by the admissions of the defendant Nos. 1 and 2 as well as by the documents proved in this suit. Non-receipt of the goods by the plaintiff is proved by plaintiff's letter to the defendant No. 2 being Ext. D tendered by consent of the parties. In reply, the defendant No. 2, by its letter dated 21-7-66, asked the plaintiff to refer the matter to the Divisional Office. This letter dated 21-7-66 is tendered by consent as Ext. E, Ext. G is a notice Under

Section 10 of the Carriers Act served on the defendant No. 1 by the plaintiff. Contents of the letter were proved by the witness Paresh Chandra Saha.

12. Hence the factum of non-receipt of goods by the plaintiff has been clearly established. Moreover, the defendant No. 1 by its letter dated 15-9-65 (Ext. 1 by consent) disclaimed all its liabilities in respect of nondelivery of goods to the plaintiff on the ground that the vessel and its cargo were seized by the Pakistan Government. By another letter dated 21-9-65 the defendant No. 2 informed the plaintiff that the Insurance cover terminated immediately on the goods being impounded by Pakistan authorities and the matter was within the control of Custodian of Enemy Property (Ext. 3). Ext. 4 is a letter by the Custodian of Enemy Property to the plaintiff sending a claim form for making a claim. This document is tendered by consent of the parties. Ext. 5 is the application by the plaintiff claiming compensation from the Custodian of Enemy Property for India in respect of the loss of goods and is dated 15-2-74. Ext. 6 is the letter dated 20-1-66 from the Joint Director informing the plaintiff that its claim in original was forwarded to the Custodian of Enemy Property and all future correspondence thenceforward should be addressed to that office directly. The aforesaid documentary evidence established beyond doubt that the said vessel and its cargo were seized by the State's enemy and the plaintiff accepted this fact and acted accordingly by preferring its claims before the Custodian of Enemy Property for India.

13. The next question is that if the vessel and its cargo were lost due to enemy action during Indo-Pakistan conflict then are the defendants in the suit liable for the loss or damage suffered by the plaintiff? It is true that the defendant No. 1 did not adduce any oral evidence but he admitted documents. The forwarding notes issued by the judgment No. 1 contained : --

'The company shall not be liable for.....any property delivered to be carried.....for loss, damage or delay directly or indirectly caused by or arising from act of god, State's enemies, with or without violence on board or elsewhere.'

14. The three forwarding notes pleaded in paragraphs 2, 3 and 4 of the plaint were disclosed by the plaintiff and tendered by the plaintiff and were marked Ext. H collectively subject to objection. These are the documents admitted by the

defendant No. 1 in its written statement and as such the objection against tendering these documents on behalf of the defendant Nos. 1 and 1A are overruled. It is strange that these defendants while strongly relying on clause 5 of these three documents had objected to the tendering of the same. It appears that the plaintiff had agreed in clear terms that if any loss or damage would be caused to the plaintiff in connection with its goods on board the ship 'Perim' due to State's enemy, the carrier would be absolved from all liabilities. It also appears that the plaintiff accepted the position that the vessel and its cargo were seized by the Pakistan Government and the plaintiff's claims would be settled by the Custodian of Enemy Property for India. Accordingly, the plaintiff lodged a claim with the Custodian of Enemy Property as would be evident from Exts. 5 and 6. Having acted in that manner, the plaintiff is not entitled to deny the fact of seizure of the goods by the State's enemy and its legal consequences. The plaintiff must accept that by virtue of the express agreement the defendant Nos. 1 and 1A are both exempted from liability for non-delivery.

15. So far as the defendant No. 2 is concerned, there was an express agreement between the plaintiff and the defendant No. 2 that the risk under the policy would cease if the goods be detained in East Pakistan water. This will be evident from the three policies, marked F collectively by consent of the parties. As a matter of fact, the then Divisional Secretary of the defendant No. 2, by his letter dated 21-9-65, denied all liabilities under the said three marine policies in respect of the goods seized. This is Ext. 3 in the suit. The plaintiffs counsel relied on : AIR1972 Cal228 , A. Akooji Jadwat Pvt. Ltd. v. Oriental Fire and General Insurance Co. Ltd. in support of his contention that no matter that the vessel with cargo was seized by the Pakistan Government and the loss was caused to the plaintiff on account of that, the defendant Nos. 2 and 2A cannot take that plea and must be held liable to the plaintiff for the total loss and must pay the value of the goods insured to compensate the plaintiff under the said three marine policies. In my opinion, the plaintiff's counsel misread the facts of that case. In that case also the vessel 'Sakeela' was captured by the Pakistan Government during hostility in 1965. But under the policy, the defendants did not protect themselves from loss or damage caused by the seizure of the goods by the Pakistan Government as will be clear from paragraph 25 of this report :

'The Insurers have received premium from the plaintiffs and they have covered 'Sakeela' against the perils of capture, seizure, detention in consequences of hostilities and warlike operations irrespective of any question whether there was a declaration of war or not. They did not protect themselves from the consequence of an unlawful or an undeclared or an informal war. On the other hand, they are bound by their contract and they cannot take shelter under the chapter of the U.N.O. nor under the law of nations.....'

On the facts of that case, it was held that the defendant in that case was liable. But in the present case, there is an express exemption clause agreed between the parties as set out above. The facts of the present case are different and will not attract the principle laid down in : AIR1972 Cal228 . On the contrary, paragraph 25 of this report indicates that if the insurer had protected themselves by the terms of the agreement, they would have been absolved from liability under the policy. The plaintiff's counsel also relies on (1894) AC 217 (HL), Richardson, Spence & Co. and The 'Lord Gough' Steamship Co. Ltd. v. Rowntree where it was held that a purchaser of a folded up ticket containing general conditions at the back of the ticket printed in very small print would not be bound by the terms unless there was evidence that the purchaser had acquainted himself with the terms clearly. In that case, the appellants had issued a ticket containing terms 'The Company is not under any circumstances liable to an amount exceeding 100 dollars for loss or injury to the passenger or his luggage.' The passenger suffered personal injury and brought an action and the jury found that the passenger knew that there were something printed on the ticket but did not know that they were the terms of the contract of carriage. Upon the finding of the jury, a decree was passed for 100. An appeal was preferred by the appellants which was dismissed. The appellant moved the House of Lords. The appeal was dismissed on the ground that the finding of the jury was right as there was no evidence that the passenger knew that the writings were the terms of the contract of carriage neither she had reasonable notice thereof. I do not think the principle laid down by the House of Lords in that case will apply in the present case. The exemption clause relied on by the defendants Nos. 2 and 2A is not printed at the back of the ticket as was the fact in that case. On the contrary, it being a special agreed term, it has been typed out in bold types on the face of the marine policies which could not escape the

notice of any body handling the documents because the rest of the document was printed. Moreover, this being a special term could not have been incorporated in the policies unless it had been specially agreed by and between the parties prior to the issue of the three policies. These three policies were in possession of the plaintiff throughout and had been disclosed and tendered by the plaintiff. There was no pleading in the plaint that the plaintiff was unaware of that term when the contract of insurance was entered into between the parties. As a matter of fact, when in my written statement the defendant No. 2 took this plea of exemption, still the plaintiff did not think it worthwhile to file a rejoinder denying the knowledge of that special term. None of the plaintiff's two witnesses said in evidence that the plaintiff was ignorant about this special contract or did not have sufficient notice thereof. Hence I hold that the case relied on by the plaintiff's counsel has no application on the facts of this case. On behalf of the defendant Nos. 2 and 2A, it is submitted that by the words 'detained in East Pakistan water' the parties had intended that if on account of Indo-Pakistan hostility the goods were seized by Pakistan Government, the risk under the policy also would (also) cease and the insurer would be absolved from all liability for loss or damage caused to the insured on that account. The counsel relied on rules for construction of policy at page 156 of *Chalmer's Marine Insurance Act 1906*, 6th Edn. The counsel strongly relied on the quotation from the decision of Justice Cave set out at page 156 :

'.....the word 'seizure' like many other words is sometimes used with more general and sometimes with more restricted meaning, and whether it is used in a particular case with the one meaning or the other depends not on any general rule but on the context and the circumstances of the case.'

It is submitted that the words 'goods are detained in East Pakistan water' should be construed according to the guideline given above on the facts and circumstances of this case. It should not be forgotten that Indo-Pakistan hostility was raging at that time and as such the parties must have meant by the words quoted above detention of goods by the Pakistan Government due to hostility resulting in impossibility of performance of the contract and thereby absolving the defendant Nos. 2 and 2A from all liability under the three policies. I accept this contention. In my opinion, the plaintiff ought to have pursued the claims lodged

with the Custodian of Enemy Property in India. In the premises, the issues are answered as follows : --

Issue No. 1(a) -- Yes.

Issue No. 1(b) -- Yes.

Issue No. 2 -- Yes.

Issue No. 3 -- Not pressed.

Issue No. 4 -- Not pressed.

Issue No. 5 -- Yes.

Issue No. 6 -- No.

In the premises, the suit is dismissed. Considering the unfortunate position the plaintiff was placed, due to circumstances I do not think I should saddle the plaintiff with the cost of this suit. I, therefore, direct that each party to pay and bear its own cost of this suit. The dismissal of this suit, however, will not prevent the plaintiff from pursuing the claim lodged with the Custodian of Enemy Property and recover the claims if such recovery is still possible.

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