Union of India and anr. Vs. M. Mariaprakasa Mudaliar Sons Karur

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Court : Chennai

Decided On : Apr-19-1971

Reported in : AIR1972Mad140

Judge : Ismail, J.

Acts : Indian Railways Act - Sections 54, 55, 56, 57, 72, 72(1), 72-A, 73, 74-A, 74-B, 74-C, 74-D, 74-E, 75, 76, 77, 78 and 78B; Limitation Act, 1908 - Schedule - Articles 30 and 31; ;Indian Contract Act, 1872 - Sections 151, 152 and 161

Appeal No. : Second Appeal No. 1837 of 1967

Appellant : Union of India and anr.

Respondent : M. Mariaprakasa Mudaliar Sons Karur

Judgement :

1. The defendant in O. S. 295 of 1963 on the file of the court of the District Munsif, Karur, who failed before the trial court as well as the first appellate court are the appellants before this court. The facts necessary for the purpose of appreciating the question that arise for consideration in this second appeal are as follows:--

The respondent herein, which is a firm, doing handloom business at Karur, despatched handloom goods to Gauhati under Parcel Way bill dated 7-4-1962. The bales were booked by the respondent "for selves" with 1054 and 1055 as their numbers for identification purposes. According to the respondent. the value of the goods as per its invoice came to Rs. 1650. On 6-9-1962, the respondent requested the Station Master at Gauhati to rebook the goods to Karur railway station enclosing the original parcel way bill to him and the receipt of the same was acknowledged on 11-9-1962, by the Station Master. But in spite of reminders in that behalf to the station master, there had been no compliance with the request of the respondent or any intimation in that behalf. On 16-11-1962, the station master, Gauhati wrote a letter to the respondent intimating that the consignment was received by him on 13-6-1962 and that he had sent it to the Lost Property Officer, North East Railway, Dilburgarh town, under "to pay" P. W. Bill No. 2161 dated 3-9-1962., He had also written that rebooking of the same could not be done and the respondent was directed to contract the goods clerk in charge of the Lost Property Office, Dilbrugarh town. In accordance with the said direction, the respondent forwarded its forwarding note for rebooking the goods to the concerned person on 28-11-1962 and the same was acknowledged on 12-12-1962. The respondent was also demanding the original parcel way bill from the station master. Gauhati, who in his letter dated 7-12-1962, wrote to the respondent to say that R. R. was not traceable and informed that an indemnity bond might be sent to the Goods clerk in charge, Dilbrugarh, to enable rebooking of the goods. This

direction was complied with by the respondent on 17-12-1962 and the receipt of the indemnity bond was acknowledged on 24-12-1962.

But in spite of repeated reminders the concerned official did not send any information. But only on 4-1-1963, the in charge officer of the lost Property Office at Dilbrugarh wrote to the respondent stating that the consignment had been sold by public auction on 23-10-1962 and returned the bond. Complaining that no notice under Section 54 and S. 57 of the Indian Railways Act had been given to the respondent and stating that the non-compliance with the requirements of those sections rendered the sale unlawful, the respondent instituted the suit for recovery of a sum of Rs. 1650 being the value of the goods. Various defences were taken on behalf of the appellants herein, the principal among which was that no claim as contemplated by Section 78-B of the Indian Railways Act had been made in writing within the time prescribed thereunder and consequently the suit was not maintainable. Both the courts below rejected this contention of the appellants and decreed the suit of the respondent. Hence the present second appeal by the defendants in the suit.

2. the only question that was argued before me by the counsel for the appellants was that the courts below were wrong in holding that a written claim contemplated by Section 78-B of the Indian Railway Act was not necessary with reference to the facts of this case. In support of his contention, the learned counsel invited my attention to two decisions of the supreme Court and one of the Kerala High Court.

3. The first decision of the Supreme Court is Governor General in Council (now Union of India) v. Musaddilal, . In that case the Railway, Administration, in spite of steps taken could not trace the consignment. In a suit for recovery of the amount of the value of the consignment. the question that arose was whether a written claim contemplated by Section 77 of the Indian Railways Act, as it stood before its amendment by the Central Act 39 of 1961 was necessary or not. Section 77 of the Indian Railways Act, as it stood before its amendment by the Central Act 39 of 1961, was as follows:--

"77. A person shall not be entitled to refund of an overcharge in respect of animals or goods carried by railway or to compensation for the loss, destruction or deterioration of animals or goods delivered to be so carried, unless his claim to the refund of compensation has been preferred in writing by him or on his behalf to the railway administration within six months from the date of the delivery of the animals or goods for carriage by railway. "

By the time the matter came to be considered by the Supreme Court, there had been a divergence of opinion between various High Courts in the country as to various High Court in the country as to whether the claim for compensation for non-delivery would fall within the scope of this section or not, since the section used only three expressions, namely, 'loss', 'destruction' or 'deterioration' of goods and the expression 'non-delivery' as such was not used. Some High Courts of this country have taken the view that if the non-delivery was the result of loss, it would fall within the scope of the expression, 'loss' itself. and if the non-delivery was not the result of the loss, then it would not fall within the expression, 'loss' occurring in this section and a written claim contemplated by this section would not be required. It is in that context, the Supreme Court has held in the decision referred to above as follows:--

"Section 77 of the Railways Act is enacted with a view to enable the railway administration to make enquiries and if possible to recover the goods and to deliver them to the consignee and to prevent stale claims. It imposes a restriction on the enforcement of liability declared by Section 72. The liability declared by Section 72 is for loss, destruction or deterioration. Failure to deliver is the consequence of loss or destruction of goods, it does not furnish a cause of action on which a suit may lie against the railway administration, district from a cause of action for loss or destruction. By the use of the expression 'loss, destruction or deterioration'. What is contemplated is loss or destruction or deterioration of the goods and the consequent loss to the owner thereof. If because of negligence of inadvertence or even wrongful act on the part of the employees of the railway administration, goods entrusted for carriage are lost, destroyed or deteriorated, the railway administration is guilty of failing to take the degree of care which is prescribed by Section 72 of the Railways Act."

4. Article 30 of the First Schedule to the Limitation Act. 1908, prescribes the period of limitation for suits against a carrier for compensation against loss or injury to goods and Art. 31 prescribes the period of limitation for suits for compensation against a carrier for non-delivery of or delay in delivering the goods. Thus Art 31 expressly provides for non-delivery while Section 77 of the Railways Act did not use the expression non-delivery. It is in view of this an argument was advanced before the Supreme Court in the above case that the word, 'loss' occurring in Section 77 of the Railways Act did not include non-delivery. The Supreme Court repelled this contention and observed:--

"But because the Indian Limitation Act provides different points of time from which the period of limitation is to run, it is not possible to infer that the claim covered by either Article is not for compensation for loss, destruction or deterioration of the goods. We are unable to project the provisions of Arts. 30 and 31 of the Limitation Act upon Sections 72 and 77 of the Railways Act and to hold that a suit for compensation for loss because of non-delivery of goods does not fall within Section 77. "

5. Thereafter, the Supreme Court referred to certain decision of the High Court which had taken the same view and disapproved the two decisions--one of the Allahabad High Court in Governor General in Council v. Mahabir Ram, and the other of the Patna High Court in Jaisram Ramrekha Das v. G. I. P. Rly., AIR 1929 Pat 109, which made a distinction between non-delivery and loss.

6. The second decision of the Supreme Court relied on is the Union of India v. Mahadeolal Prabhu Dayal. . In that case, the Supreme Court had to consider the same question regarding the non-delivery of goods. The Supreme Court reiterated the view it had already taken in the decision referred to above namely, , in the following terms:--

"Now Section 77 inter alia provides that a person shall not be entitled to compensation for the loss, destruction or deterioration of animals or goods delivered to be carried by railway, unless his claim to compensation has been preferred in writing by him or on his behalf to the railway administration within six months from the date of the delivery of the animals or goods for carriage by railway. There was a conflict between the High Courts on the question whether non-delivery of goods carried by railway amounted to loss within the meaning of Sec. 77. Some High Courts (including the Patna High court) held that a case of non-delivery was district from a

case of loss and no notice under Section 77 was necessary in the case of non-delivery. Other High Courts, however, took a contrary view and held that a case of non-delivery also was a case of loss. This conflict has now been resolved by the decision of this court in and the view taken by the Patna High Court has

been overruled. This court has held that failure to deliver goods is a consequence of loss or destruction and the cause of action for it is not distinct from the cause of action for loss or destruction, and therefore, notice under Section 77 is necessary in the case of non-delivery which arises from the loss of goods. "

From this, it will be clear that both the above two decisions of the Supreme Court were concerned only with one question, namely, whether non-delivery will be comprehended by the expression 'loss of goods' occurring in Section 77 of the Railways Act as it stood before its amendment by the Central Act 56 of 1949 and the Central Act 39 of 1961 and the Supreme Court did not decide any other question. It was fairly conceded before me that these two decisions of the Supreme Court were not concerned with the case where the goods have been sold by the railway administration itself.

7. As far as this position is concerned, there are two decision, one of the Patna High Court, prior to the two decisions of the Supreme Court referred to above, and the other of the Kerala High Court rendered subsequent to the above two decisions of the Supreme Court.

8. In Sundarji Shivji v. Secretary of State. AIR 1934 Pat 507 at p. 510 the Patna High Court held regarding Sec. 77 of the Railways Act as follows:--

"The section in question, to my mind, has no application to the circumstances of a case of this kind, it refers only to a claim to a refund of an overcharge or compensation for loss, destruction or deterioration of goods delivered to be so carried, that is to say, it refers to a suit against the carrier in his capacity as a carrier for the loss destruction or deterioration of the goods. This section therefore refers to the special liability of the carrier as such; it has no application to the broad liability of the defendants in this case as tort-feasors quite apart from their position of railway carriers. This section, therefore, in my opinion, has no application whatever. "

That was also a case where the goods were sold by the railway administration purporting to exercise its powers under Section 55 of the Indian Railways Act. It may be noticed here that this decision was not one of the decisions overruled by the Supreme Court in . The decision of the Patna High Court which was

overruled therein and referred to in the subsequent decision of the Supreme Court was one dealing with the question of non-delivery as distinct from loss of the goods.

9. The decision of the Kerala High Court is Sree Sai Baba Textiles v. Union of India. . That was a case where the goods had been sold by the railway administration under Section 55 of the Indian Railways Act. A question arose whether a written claim contemplated by Section 77 of the Act should be given or not. The Kerala High Court, following the decision of the Supreme Court in held that written claim contemplated by Section 77 of the Act was necessary. This is what the learned Judge stated:--

"Section 72 of the Act prescribed the general responsibility of the railway

administration as carrier of goods. The measure of responsibility for loss, destruction or deterioration of goods is defined by Section 72(1) of the Act to be that of a bailee under Sections 151, 152 and 161 of the Indian Contract Act, 1872 subject to the other provisions of the Act. Sections 72 and 77 are included in Chapter VII dealing with responsibility of a railway administration as a carrier of goods. under the general law, a bailee who has no right to sell the goods bailed unless such right is conferred upon him either by contract or by any special statute. Section 55 of the Act confers on the railway administration the power to sell the goods. provided the conditions mentioned in the section are satisfied. The power conferred on the Railway administration by Section 55 of the Act is in its capacity as a bailee in acting as a carrier of goods. A bailee selling the goods in violation of the provisions of Ss. 55 and 56 of the Act will no doubt be guilty of wrongful conversion. In the appeal before us the sale held under Section 55 was found by the courts below to be not valid. Even then the failure to deliver the goods is consequence of such wrongful conversion will result in the loss of goods delivered to the railway administration within the meaning of Section 77 of the Act. " After referring to the two decisions of the Supreme Court referred to already, the learned Judges observed:--

"Though in the two decisions of the Supreme Court quoted above, the failure to deliver goods was occasioned by a sale purported to have (sic) conducted under Sec. 55 of the Railways Act. the ratio of the decisions will include even loss occasioned by non-delivery of goods due to a wrongful sale within the meaning of Section 55 for the purpose of Section 77 of the Act. We therefore hold that the suit is barred under Section 77 of the Act. "

10. From the above discussion, it will be clear that barring the decision of the Kerala High Court referred to above, there is no other decision directly holding that when the railway administration exercised its power of sale under Section 55 or Section 56 of the Railways Act, which sale turns out to be wrongful subsequently for failure to comply with the requirements of that section, it can be said to be covered by the expression 'loss of goods' occurring in Section 77 of the Railways Act and therefore a written demand or claim as a condition precedent to the institution of the suit was necessary. Since the above decision of the Kerala High Court is not strictly binding on me, let me consider the question purely as a matter of language of Section 77 itself. I have already extracted the said Section 77 in full and all that is necessary for me to repeat at this stage is that the expression used is 'loss of goods'. when the railway administration consciously sells the goods in its possession in exercise of its statutory powers under Sections 55 and 56 of the Railways Act. In my opinion, such, a sale cannot come within the scope of the expression 'loss of goods' Hence whatever else the expression 'loss of goods' may mean, certainly it cannot mean the self-deprivation of the goods by way of such sale by the railway administration. When the railway administration itself expressly and consciously in the purported exercise of its statutory powers under Section 55 and 56 of the Railways Act, sells the goods, it certainly cannot be said that the goods had been lost or there had been loss of goods. In this context, Mr. S. K. L. Ratan learned counsel for the appellants, strongly relied on the following sentence in the decision of the Supreme Court in -

"If because of negligence or inadvertence or even wrongful act on the part of the employees of the railway administration, goods entrusted for carriage are lost, destroyed or deteriorated, the railway administration is guilty of failing to take the degree of care which is prescribed by Section 72 of the Railways Act. "

The learned counsel stressed the words 'negligence or inadvertence or even wrongful act' and contended that when the railway administration by negligence or inadvertence or wrongful act sells the goods under Section 55 or 56 of the Railways Act, it will amount to loss of goods. I am unable to accept this contention. When the supreme court used the said expression, it intended to use the same where goods are actually lost by inadvertence or negligence or even by wrongful act on the part of the employees; for instance, theft by the employee himself or a theft having taken place as a result of the negligence on the part of the employee of the railway administration or the goods having been washed away by the failure of the employee of the railway administration to take necessary care. In my opinion, the sentence occurring in the judgment of the Supreme Court referred to above will not cover a case where the railway administration in the exercise of its statutory powers sells the goods under Section 55 or 56 of the Railways Act. For these reasons. I am unable to agree with the view of the Kerala High court expressed above.

11. There is yet another consideration which induces me to come to the conclusion that such a sale of goods by the railway administration will not fall within the scope of the expression 'loss of goods' occurring in Section 77 of the Railways Act. The object of insisting on a written demand or claim as a condition precedent for instituting a suit is to enable the railway administration to make necessary enquiries with regard to the consignment and to take adequate steps to trace the same and in the case of deterioration to find out the cause thereof, when the incident of loss etc, is still fresh and the best evidence available. But in the case of a conscious act of sale by the railway administration in the purported exercise of its statutory powers, such consideration will not be available, because such a sale will be a matter of record and the circumstances which occasioned or justified the sale will also be a matter of record.

12. Apart from this aspect, there is entirely a different but most relevant aspect in this behalf. the Supreme Court in , took care to make the following observations:--

"We are in this case concerned with the Act as it was in 1947 before its amendment by Central Act 56 of 1949 and Central Act 39 of 1961 and all references in this judgment must be read as applying to the Act as it was in 1947. "

This observation of the Supreme Court is very significant from more than one point of view. In the first place, before the Act was amended in 1949, Section 72 which alone dealt with the nature of the liability of the railway as a carrier stood as follows:--

"72 (1) The responsibility of a railway administration for the loss, destruction or deterioration of animals or goods delivered to the administration to be carried by railway shall subject to the other provisions of this Act, be that of a bailee under Sections 151, 152 and 161 of the Indian Contract Act, 1872 (9 of 1872).

(2) An agreement purporting to limit that responsibility shall, in so far as it purports to effect such limitation, be void, unless it-

(a) is in writing signed by or on behalf of the person sending or delivering to the railway administration the animals or goods, and

(b) is otherwise in a form approved by the Central government.

(3) Nothing in the common law of England or in the Carriers Act, 1865 regarding the responsibility of common carriers with respect to the carriage of animals or goods, shall affect the responsibility as in this section defined of a railway administration. "

13. The effect of this section was to expressly provide that the liability of the railway administration in respect of carriage of goods or animals was only that of a bailee and not that of a common carrier. Sub-section (2) of this section was omitted by the Central Act 56 of 1949. However, the Central Act 39 of 1961 effected a complete change in respect of the nature of the responsibility or liability of the railway administration for the carriage of goods or animals entrusted to it. The entire group of Sections 72, 72-A, 73, 74-A, 74-B, 74-C, 74-D, 74-E, 75, 76, 77 and 78 was repealed and replaced by a new set of provisions. The most important of the same is section 73 and that it as follows"

"73 General responsibility of a railway administration as a carrier of animals and goods. Save as otherwise provided in this Act, a railway administration shall be responsible for the loss, destruction, damage, deterioration of non-delivery, in transit, of animal or goods delivered to the administration to be carried by railway arising from any cause except the following namely-

(a) act of God;

(b) act of War;

(c) act of public enemies;

(d) arrest, restraint or seizure under legal process;

(e) orders or restrictions imposed by the Central Government of a State Government of by any officer or authority subordinate to the Central government or a State government authorised in this behalf:

(f) act or omission or negligence of the consignor or the consignee or the agent or servant of the consignor or the consignee;

(g)natural deterioration or wastage in bulk or weight due to inherent defect, quality or vice of the goods;

(h) latest 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 of 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 administration further proves that it has used reasonable foresight and care in the carriage of the animals or goods."

Another section which is of importance is Section 77(1) and it provides:--

"A railway administration shall be responsible as a bailee under Ss. 151, 152 and 161

of the Indian Contract Act 1872, for the loss, destruction, damage, deterioration, or non-delivery of goods carried by a railway within a period of thirty days after the termination of transit."

The next important section is section 78-B which corresponds to the previous Section 77 and the same is as follows:

"78-B Notification of claims to refunds of overcharges and to compensation for losses:--A person shall not be entitled to a refund of an overcharge in respect of animals or goods carried by railway or to compensation for the loss destruction, damage deterioration or non-delivery of animals or goods delivered to be so carried, unless his claim to the refund of compensation has been preferred in writing by him or on his behalf-

(a) to the railway administration to which the animals or goods were delivered to be carried by railway or

(b) to the railway administration on whose railway the destination station lies, or the loss, destruction, damage or deterioration occurred, within six months from the date of the delivery of the animals or goods for carriage by railway. "

14. There is an important proviso to this section, but since that proviso has no application to the facts of this case, I am not extracting the same. This Amendment Act, Central Act 39 of 1961, came into force on 1-1-1962, and the consignment which is the subject-matter of the present second appeal was booked subsequent to the coming into force of this Act and strictly speaking the provisions of the Railways Act, as amended by the Central Act, 39 of 1961, alone will govern the present case. It is admitted before me that there has been no direct decision under Section 78-B of the Act. after the Central Act 39 of 1961 came into force. I shall refer to the most important changes that have been brought into existence by the Amendment Act, namely, the Central Act, 39 of 1961.

15. The first important change is that the nature of the liability of the railway administration as a carrier has been changed from that of a bailee into that of a common carrier, namely, as an insurer, subject to the restrictions mentioned in Section 73. In addition to this positive provision, sub-section (3) of Section 72 (before amendment) which expressly provided that nothing in the common law of England or in the Carriers Act, 1865, regarding the responsibility of common carriers with respect to the carriage of animals or goods, shall affect the responsibility as in that section defined of a railway administration, has been deleted from the statute. The second important change is that under the amended provision, the railway administration will continue to be liable as a bailee for a period of thirty days after the termination of transit. The third important change is, Sections 72 and 77 of the Act as they stood prior to the amendment in 1949 used only three expressions, namely, 'loss', 'destruction' or 'deterioration' and now Sections 73 and 78-B have enlarged the scope by using two more expressions, 'damage' and 'non-delivery'.

16. The question for consideration is whether as a result of these changes effected by the Central Act 39 of 1961, can the position be said to be different? I may point out one thing immediately. The decisions prior to the Central Act 39 of 1961 including those of the Supreme Court holding that non-delivery is comprehended by the expression 'loss of goods' will no longer be of any relevancy or validity because non-

delivery has been specifically and separately provided for in the new Sections 73 and 78-B. From this it may follow that the expression 'loss' is not intended to be construed so comprehensively, as it was construed before the Amendment Act 39 of 1961.

17. There is yet another consideration for not construing the expression 'loss of goods' so widely and that consideration is, that the liability of the railway after the Amendment Act of 1961 is not that of a bailee and as far as the present suit is concerned, the liability of the railway is that of a common carrier, namely, an insurer. In this context, it is useful to refer to the decision of the High Court of Andhra Pradesh in Union of India, v. M. Pullappa. AIR 1958 Andh Pra 475. In that case it was pointed out,--

"The word 'loss' has been interpreted in various English decisions, to mean loss by the carrier and not simply loss to the owner. Those decisions were given in cases under the Carriers Act, 1830; but it has to be observed that in Section 72(3) of the Indian Railways Act, it is stated 'nothing in the common law of English or in the Carriers Act, 1865 regarding the responsibility of common carriers with respect to the carriage of animals or goods, shall affect the responsibility as in this section defined of a railway administration'. Under those circumstances the word 'loss' cannot bear a restricted meaning assigned to it in English cases. The Acts are not in pari materia as observed inM. S. M. Railway v. Haridoss Banmalidoss. AIR 1919 Mad 140 = ILR 41 Mad 871. The word 'loss' has to be interpreted in the context in which it occurs.

The words are 'compensation of loss..... ' They have to be given their plain and natural meaning. The words imply that the claimant would be entitled to compensation for the loss sustained by him whether such loss is occasioned by non-delivery on account of the tortous conduct of the railway or its servants or by conversion of the goods or by the goods being lost in transit."

18. The above observations clearly show that the expression 'loss' occurring in Sections 72 and 73 (prior to their amendment) happened to be interpreted widely in view of the specific provision contained in Section 72, limiting the liability of the Railway as that of a bailee only and the provision contained in Section 72(3) excluding the applicability of anything contained in common law of England or the Carriers Act of 1865. Once sub-section (3) of Section 72 has ceased to exist in the statute and the liability of the railway has been transformed from that of a bailee into one of a common carrier, I am clearly of the opinion that the very rationale behind the conclusion of the Andhra Pradesh High Court in the decision referred to above will necessarily involve that the word 'loss' occurring in Section 73 and Section 78-B of the Railways Act after its amendment by Central Act 39 of 1961 has to be construed narrowly and not as widely as was done prior to the amendment. For these reasons. I am clearly of the view that even if I am wrong in holding that the expression 'loss' occurring in Sec. 77 of the Railways Act before its amendment in 1961. did not include sale of the goods by the railway administration itself, after the Amendment Act of 1961, the expression 'loss' occurring in Sections 73 and 78-B cannot be construed so widely as to include the sale of the goods by the railway itself in exercise of its statutory powers under Sections 55 and 56 of the Railways Act.

I may point out in this context that there is no charm or magic in the use of the expression like 'wrongful conversion'. The simple fact is that the railway administration itself has sold the goods purporting to exercise its powers under

Sections 55 and 56 of the Act, but that sale was ultimately found to be not lawful since the administration had not complied with the requirements of the mandatory provisions contained in the very sections which authorised the railway administration to sell the goods. As far as the present case is concerned, it has been found and it is not challenged before me that the sale was not conducted in accordance with the provisions of Sections 55 and 56 of the Railways Act and therefore it is not a valid sale. If so, the only question for consideration is, whether such a sale can come within the scope of the expression, 'loss of goods' occurring in Section 78-B of the Act. In my opinion, it cannot. On this conclusion, it follows that the suit instituted by the respondent is maintainable and the respondent is entitled to the relief which it prayed for.

19. Under these circumstances, the second appeal fails and is dismissed with costs. No leave.

20. Appeal dismissed.