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GOGAY & SONS

v.

GIRWAR SINGH & SONS

B

[SUPREME COURT, 1974 (Stuart J.), 2nd May]

Appellate Jurisdiction

Negligence—goods destroyed by fire whilst in the custody of carrier—whether reasonable care exercised by carrier during journey.

C *Bailment—destruction of goods by fire—burden of proof on bailee to show that he had taken proper and reasonable care of goods whilst in his possession.*

Goods belonging to the appellant had been delivered to the respondent firm for transportation by truck from Lautoka to Ba. During the course of their journey, the goods were destroyed by fire.

D The driver of the truck gave evidence that the truck had caught fire, that the goods were destroyed, and that he was unable to put out the fire. He gave no evidence as to how the fire occurred or its cause; nor did he show that he had taken reasonable and proper care of the goods.

Held : The respondent firm, as bailee of the goods, was responsible for their return and if it failed in this duty, it rested on it to prove that it had taken proper and reasonable care of the goods and that what happened, had E occurred without default on its part.

Cases referred to :

Houghland v. Low [1962] 2 W.L.R. 1015 ; [1962] 2 All E.R. 159.

Thomas National Transport (Melbourne) v. May & Baker (1966) 115 C.L.R. 353.

F

Appeal against the judgment in the Magistrate's Court in favour of the respondent firm.

B. C. Patel for the appellant.

D. S. Sharma for the respondent.

STUART J. : [2nd May 1974]—

G

This is an appeal from a decision of a Magistrate at Lautoka. The appellant was a plaintiff suing for $305.08 the value of certain goods which came by ship to Lautoka and were delivered to a carrier to transport from Lautoka to Ba. To begin with, the value of the goods was $238.85, the cost of freight as per the Bill of Lading was $28.44, and there was over insurance and survey report fees amounting to $40.46. He claimed that he had delivered H these goods to a carrier and they had not been delivered. The defence alleged that defendant was a private carrier, and that the goods were not delivered because they were destroyed by fire in the course of transportation through no lack of care on his part. Plaintiff replied alleging that defendant was a

common carrier. When the case came for trial, plaintiff had to prove that defendant was a common carrier and the Magistrate ruled that he had to begin. He does not now complain of that. Plaintiff called evidence, none of which touched upon the destruction of the goods, and defendant called the driver of the vehicle which had carried the plaintiff's goods and he deposed that on the way from Lautoka to Ba, his truck caught fire, and he did his best to stop the fire. He said that the fire was on the back of the tray where the goods were. At that stage, although the driver had not actually said that there was no negligence on his part, the inference was as clear as a bell, and I am at a complete loss to understand why counsel for the plaintiff did not cross-examine the witness on the subject of the cause and origin of the fire. Cross-examination, after all, is for the purpose of discovering the truth, and if in this case plaintiff did not endeavour to discover the truth, he cannot complain if the Court draws an inference against him. And that is precisely what happened. The Magistrate held that there was no sufficient evidence to establish defendant as a common carrier, and that he did not cause the fire and was unable to do anything to prevent it, and that on his evidence no negligence was established. The plaintiff appeals.

The burden of the appeal is that it was for the defendant to show how the fire started. Mr Patel for the appellant says that the burden was on defendant to show that there was no negligence on his part in the care which he took of the goods, and he referred to *Houghland v. Low* [1962] 2 W.L.R. 1015. He argued that there was no sufficient evidence to justify the Magistrate's finding. Mr Patel appears to found his argument on the phrases " . . . in his evidence no negligence has been established ": " The plaintiff has not established his claim. " *Houghland v. Low* was a case where the plaintiffs placed their suitcase on the defendant's couch at Southampton and it did not arrive at its destination at Hoylake. It was admitted that the plaintiff had made out a *prima facie case*. Willmer L.J. puts the matter thus at p.1019 " That *prima facie* case stands unless and until it is rebutted. The burden was on the defendants to adduce evidence in rebuttal. They could discharge that burden by proving what did happen to the suitcase, and by showing that what did happen happened without any default on their part. They certainly did not succeed in doing that, for the judge was left in the position that he simply did not know what did happen to the case.

Alternatively, the defendants could discharge the burden upon them by showing that, although they could not put their finger on what actually did happen to the suitcase, nevertheless, whatever did occur occurred notwithstanding all reasonable care having been exercised by them throughout the whole of the journey. "

Now, in this case the only evidence about the fire was that of the defendant's driver and he said that he was driving his vehicle from Lautoka to Ba. He goes on

> " I was carrying goods consigned to the plaintiff. On the way a lady stopped me and informed me my truck had caught fire. I stopped immediately. I got off the truck, saw the fire—a big fire had spread—and did my best to stop it. The fire was on the back of the tray where the goods were kept. Some Sunshine milk and Milo were burning in tins. It was packed in cartons. I was unable to put the fire out. After that the fire brigade arrived and the fire was extinguished. By that time it was fairly late. My truck was driven to the police station. I looked under the tray. Everything was in good and functioning condition. "

Now looking at that evidence in the light of the statement of Willmer L.J. the defendant has certainly not shown what did happen, and how that fire occurred or what was the cause of it. Nor has he shown that, although he cannot put his finger on what did actually happen, whatever did occur, occurred notwithstanding all reasonable care having been exercised by him. He has given evidence of no precautions he took: there is no evidence to show that there were no inflammable goods on his lorry. I would not myself have thought that tins of Sunshine Milk and Milo were readily or highly inflammable. If they are, I think that defendant should have brought evidence to say so. Buckley L.J. in *Joseph Travers & Sons v. Cooper* [1915] 1 K.B. 73 used somewhat stronger language than Willmer L.J. He said at p.86 " The defendant as bailee of the goods is responsible for their return to their owner. If he failed to return them it rested upon him to prove that he did take reasonable and proper care of the goods and that if he had been there he could have done nothing and that the loss would still have resulted. He has not discharged himself of that onus. " In *Thomas National Transport (Melbourne) v. May & Baker* (1966) 115 C.L.R. 353, the plaintiff's driver being unable to deliver defendant's goods to its delivery depot, took them to his home and there they were destroyed by a fire in his garage. The cause of the fire was not ascertained, but the driver did a great deal more than merely say " There was a fire. I do not know how it happened. " I have come to the conclusion, though not without some hesitation, that the appellant is entitled to succeed on this ground, and it is thus unnecessary to discuss the further subject of *res ipsa loquitur*.

Mr Sharma complained that the plaintiff had not proved his claim, but I see that the record shows him as saying to the learned Magistrate ' Onus on plaintiff. If found that defendant is common carrier, liability would be for $264.62 '. The appeal will be allowed and the case will be remitted to the Magistrate's Court for judgment to be entered for the plaintiff for $264.62 and costs as on that sum. The appellant will have his costs of the appeal.

Appeal allowed.