MFA 297/2010
BEFORE
HON'BLE MR. JUSTICE KALYAN RAI SURANA

Heard Mr. MP Sarma, the learned counsel appearing on behalf of Mr. UK Nair, the learned senior counsel for the appellant and Ms. M. Sarma, the learned counsel for the respondent.

2. This appeal under Section 23 of the Railway Claims Tribunal Act, 1987 is directed against the judgment and order dated 29.07.2010 passed by the learned Railway Claims Tribunal, Guwahati Bench, Guwahati in Claim Case No.205/2002. By the impugned order, the appellant was found liable to pay Rs.23,324/- as loss against the value of 2450 Kg. of rice calculated at the rate of Rs.9.52 per kilogram and the appellant was liable to pay 6% interest per annum from the date of filing of the application, requiring the appellant to make payment of the said sum within 90 days from the date of the order failing which the amount would carry further interest of 7% per annum till realization. The appellant was also held liable to pay proportionate cost of application fee of Rs.1198/- and legal practitioner's fee of Rs.1,234/-.

3. The short facts of the case is that the respondent was to receive 1156 bags of rice being 50 Kg each which was booked on 27.08.1999 from Palakollu to New Guwahati under Receipt No.07-D-031015. According to the respondent No.1, at the destination, 49 bags of rice were delivered short by the appellant. The appellant was served notice dated 08.10.1999 under Section 106 of the Railway Claims Act, 1989. Having not received the value of goods, a claim application was filed before the Railway Claims Tribunal, Guwahati, claiming the value. During trial, the learned Tribunal has framed the following issues:
1) Whether valid notice in terms of the u/s 106 of the Railways Act, 1989 served to the respondent railway within time?
2) Whether applicant hold legal title to demand compensation as prayed in his claim application with interest?
3) Whether respondent proves that goods arrived at destination in seal intact wagon?
4) Whether the respondent railway had been negligent which resulted in shortage to the consignment during transit?
5) Relief and order?

4. The learned Tribunal held in respect of issue No.3 that the appellant had not submitted the forwarding note, transit report, seal and card label, etc. to prove that the wagon was received in seal rivet intact condition (SRI condition). The issue No.3 was decided against the appellant and for the same in respect of issue No.4 also it was held that in the absence of seal card label, transit report and forwarding note, it was not established that the consignment reached intact at the destination. It was also held that the number of bags unloaded are less than the booked bags as per railway receipt and it was held that negligence on the part of the appellant has been proved and therefore, this issue was also decided against the appellant.

5. The learned counsel for the appellant submits that there was an endorsement in the railway receipt that the bags were booked under 'said to contain basis and the goods were booked on the basis of declaration given at the time of booking and therefore, it was the burden of the respondent herein that 1156 bags were properly loaded at the time of booking.

6. By taking aid of Section 64(1) of the Railways Act, 1989, it is projected that the railway authorities is to issue a forwarding report only on the basis of declaration made at the time of loading of the rice in the train on 'said to contain basis'. Therefore, adverse inference which was drawn by the learned Tribunal on issue No.4 is not sustainable because the primary liability remained o

n the part of the respondent No.1 to prove the quantity of rice which was loaded in the concerned wagon during the transportation.

7. Reliance has been placed on the provisions contained in para-1836 of the Indian Railway Commercial Manual, Volume-II, Third Edition, 1991, which reads as follows:

1836- In respect of a said to contain receipt, the consignee/endorse may be permitted to pass remarks in the goods delivery book for the actual number of bags, etc., delivered to him; remarks regarding the actual shortage should not be allowed to be passed in such cases. In other words, a remarks as 'delivered & packages short', etc., should not be allowed.

8. It is submitted that if there was a dispute with regard to the goods which was being delivered, in terms of the provisions of Section 81 of the Railway Claims Act, 1989, the respondent should have taken open delivery of goods by following the procedure prescribed under para-1842 of the Indian Railway Commercial Manual.

9. The learned counsel for the appellant heavily relies on the reply letter dated 12.04.2000 issued by the General Manager/Claims, NF Railway, Maligaon to the respondent No.1 indicating that as the consignment was received at destination on 09.09.1999 and delivered on clear receipt on the same date, the claim was inadmissible. He also heavily relies on the certificate issued by the Chief Goods Superintendent, NF Railway, New Guwahati, indicating that the goods were delivered from direct seal intact wagon from the boarding station. It is further submitted that as the goods were booked under 'said to contain' basis, no liability could have been settled on the appellant. In support of his contention, the learned counsel for the appellant has relied on the case of Sreeniwas Basudeo Vs. Union of India, 2002(1) GLT 605.

The relevant paragraph-3 is extracted below:

(3) It would appear from the above that the Railway Authorities never accepted the weight indicated by the sender in the R.R. the forwarding note and the railway receipt indicate that the consignments were booked with the remark said to contain . According to learned Tribunal, this remark is sufficient enough to conclude that the bags of rice were not weighed at the booking point. Therefore, the learned tribunal relied upon the shortage found between the weighment done at the transshipment point and the destination point. In view of the above remark in the R.R., the Tribunal appears to have rightly rejected the claim of the appellant.

10. He also relied in the case of Union of India vs. Aluminum Industries Ltd., AIR 1987 ORISSA 149, to project that a shortage certificate issued by the Railway does not amount to admission of liability and help the consignee as to the time of delivery and is merely evidence of actual event that certain goods or articles have fallen short with reference to what the plaintiff states to have been dispatched.

The relevant parargarph-9 is quoted below:

8. A shortage certificate amounts neither to an acknowledgment of liability nor holds out any hope to the consignee as to the time of delivery and is merely evidence of actual event that certain goods or articles have fallen short with reference to what the plaintiff states to have been despatched. A shortage certificate is no proof of the fact that the quantum of goods claimed to have been despatched has actually been despatched unless the fact of despatch of the quantum of goods is actually established. In this connection, reference may be made to the principles laid down in (1962) 28 Cut LT 540 : (AIR 1963 Orissa 31), Union of India v. Prakash Ch. Sahu. In AIR 1973 Pat 244, Union of India v. Chotelal Shewnath Rai, it has been held that where there is no evidence to prove the actual weight of the goods loaded in the wagon-and the loading had been done at the despatching station by the consignor, the Railway Administration is not liable for sho

rt delivery detected at the destination. From mere mention of a particular weigh t on the railway receipt and the forwarding note for the purpose of calculating the freight charge, no admission on the part of the railway as to the correctnes s of the weight of the goods loaded can be made out to fix up the liability.

11. Relying on the said judgment, it is submitted that a mere mention by the concerned railway staff in the tally book that unloaded only 1107 packets of ri ce found on counting, does not create a liability against the appellant and ther efore, the burden of proof of the actual quantity of goods loaded will remain on the respondent No.1.

12. Per contra, the learned counsel for the respondent has submitted that on perusal of the relevant part of the Railway receipt at the column of risk rate, it would be apparent that the goods were booked at the Railway risk which in short was written as RR. It is submitted that once goods are booked at the Railw ay risk, a mere mention in the said receipt that the consignment is 'said to con tain' basis and receipt of less than 1156 bags of rice, would not absolve for wi ther away the Railway risk. In support of the said contention, the learned coun sel of the respondent submits that this issue was also settled by this Court vid e judgment dated 02.03.2017 passed in MFA No.18/2009 (Union of India vs. M/s Gan apati Enterprise).
The relevant para-6 of the said judgment is quoted below:
6. In reply, the learned counsel for the respondent Mr. A. Goyal submitted that the above judgments will have no application in the present case as the goods i n that cases above were booked under the remark Said to contain while as in th is case the goods were booked under Railway Risk . The learned counsel thereaft er, submitted that the fact that the consignment was booked under the railway r isk can be seen from the railway receipt issued by the appellant which was also filed by the appellant/railways before the learned Tribunal. The learned counse l drew my attention to the receipt, particularly, at the column of risk rate w herein handwritten RR appears. According to the learned counsel RR stands f r railway risk. Thereafter, the learned counsel went on to submit that, the fact that the word Said to contain was stamped on the receipt cannot change the ch aracter of the booking as the letters RR are written in the risk rate column o f the receipt. The learned counsel in addition submitted that the appellant/rail ways did not deny in their written objection, the claim of the respondent/claima nt that the goods were booked under the railway risk, therefore, the submission of the learned counsel for the appellant/railways that the goods were booked und er Said to contain cannot be accepted at this stage. There is no contention fr om the learned counsel for the appellant that the said receipt was not issued by the railway, but the only submission made by her is that the word Said to cont ain was stamped on it, therefore, the booking and the consignment was under the remarks Said to contain . I am unable to agree with the learned counsel for th e appellant/railways on this, because, in the right column of the receipt the wo rd RR which indicates railway risk was written by none other than the staff co ncerned of the railway employees. And there is no specific denial on the same. T herefore, it is concluded that the consignment was not under the remarks Said t o contain but under the remark railway risk as claimed by the learned counsel of the respondent/claimant.

13. It is further submitted that by referring to para-1714 of the Indian Rai lway Commercial Manual that the said rule require that a seal and label should b e carefully preserved for 6 months and then destroyed but it also provides that in case of shortage from wagons or any dispute or claim, they should be submitte d with the missing and damage goods report. She further submits by referring to para-1710 to 1713 of the said Manual that it provides for examination of seals, labels etc. and the procedure of removal of rivets, seals, labels etc. It is submitted that as the goods were booked on the Railway risk, it was the burden o f the appellant to produce the same to prove that wagons were intact at the time goods were unloaded. She also refers to para-1715 relating to unloading tally

book to show that it was the responsibility of the appellant that the goods shou ld be carefully tallied out of wagon and the details of the number of packages a nd consignment taken out of each wagon should be entered in the unloading tally book.

14. The learned counsel for the respondent has referred to the judgment of t his Court passed in M/s Jyoti Floor Mills vs. Union of India & others , (1984) 1 GLR 276, and the judgment and order dated 27.11.2015 passed by this Court in MF A No.20/2008 (General Manager, NF Railway vs. M/s Sunrise Trading) as well as th e judgment and order dated 11.08.2016 passed in the case of MFA 16.2011 (Union of India vs. M/s Sabitri Salt Suppliers).

15. In the case of M/s Jyoti Floor Mills (supra), relying on other judgments cited therein, it was held that for the railway administration to be absolved o f its liability under Section 73, it was necessary that in the forwarding note n ot only there should be a recording of the fact of defective and improper packin g of the goods but also it should be further recorded that as a result of such d efective or improper packing the goods are liable to damage, deterioration, leak age or wastage.

16. In the case of M/s Sunrise Trading (supra) in paragraph -10, it was held that once it was found that the proof as to SRI condition of the wagon was in the custody of the NF Railway and that the same was not produced before the Trib unal for examination, adverse presumption under Section 114 of the Indian Eviden ce Act has to be taken against Railway to arrive at the finding that the wagon w as not in SRI condition. Therefore, it was held in the said case that the learn ed Tribunal did not commit any error in holding the NF Railway for making paymen t of compensation.

17. Similar view was taken in the case of M/s Sabitri Salt Suppliers (supra) that the adverse presumption drawn against the SRI condition was not proved by the Railway.

18. The learned counsel for the respondent No.1 submits that there is no mer it in the appeal and the same may be dismissed as there is no scope for interfer ence with the impugned judgment passed by the learned Tribunal, which is correct both in facts and in law.

19. I have considered the arguments advanced by both sides.

20. From the LCR, it appears that the railway had produced extract or true c opy of the Delivery Book No.SL/42/20 mentioned of 1156 bags of rice. From th e true copy of the tally book, which was produced by the Railway authority, it a ppears that there was a mention of 1156 bags of rice at the time of loading and at the time of delivery 1107 bags of rice was found in the wagon and matter was immediately informed to the concerned authorities. It is further stated therein that the bags were unloaded in open shed veranda and jointly counted with the a uthority named therein. The said entries of the tally book was made on (date) 9. 9.(year not written). The unloaded tally book mentioned in para-1715 of the Ind ian Railway Commercial Manual, which is reproduced herein below:

1715: Unloading tally book.- The goods should be carefully tallied out of wagon and details of the number of packages and consignment taken out of each wagon s hould be entered in the unloading tally book in Form Com./T-1 Rev., which should be kept a the station. This tally is to be made by actual counting of packages a unloaded or, where practicable, by counting all the packages in a wagon befor e unloading. The total number unloaded should agree with the number shown on th e unloading memo or wagon labels and summaries. The Station Master should ensure that the goods, on arrival at destination station, have been carefully tallied out of the wagon and agreed with the relevant record.

21. On perusal of the said Manual, it appears that para-1512 also prescribes for tally book for outward goods there under it is required that while loading goods should be tallied into wagons and description and number of packages of ea ch consignment put into each wagon should be entered in the tally book From Com. /T-1 Rev., which is supplied to every Loading Clerk. It is prescribed therein t hat the easiest way of doing this is for the Loading Clerk to stand at the door of the wagon and record in his tally book, in ink, each package or article that is passed into the wagon and it was further mentioned that it is very important that the entries are made directly in the tally book at the time the packages ar e loaded and not copied out from rough notebooks.

22. In the instant case, it is a recorded in the Railway receipt that 1156 b ags of rice was loaded and therefore, it was the burden of the Railway to bring on record the tally book. It is further seen that in the present case in hand, t he consignment was not booked in a private siding. It is also not the proven ca se of the appellant that the consignment was not loaded under the supervision of the Railway staff and therefore, requirement of an entry into the tally book wa s dispensed with.

23. In the case of Aluminum Industries Limited (supra), the PW.1 admitted in cross examination that the goods were loaded in the private site and therefore, when the loading was not supervised by the Railway authorities, the shortage ce rtificate issued by the Railway administration was held to be no evidence becaus e there was no proof of the actual loading and therefore, in that case, a shorta ge certificate did not create any legal evidence to debar the Railway from disow ning their liability as there was no Railway staff supervising the loading of go ods in the wagon.

24. As per the entries made in the true copy of the tally book, which was pr oduced by the appellant, when the goods were found short, all the bags of rice w as stacked in open veranda and jointly counted by the Officers named therein. T herefore, in the opinion of this Court, it amounted to a sort of open delivery o f consignment which falls within the meaning of Section 81 of the Railways Act, 1989. In the present case in hand, there is no dispute as regards the weight of rice contained in the bags but this was a case where 49 bags of rice was found to be short. Therefore, it was not required for the Railway authorities to open up every bag to make it an open delivery because the weight was not in dispute as required by opening of bags and only the actual number of bags were required to be counted and not the weight in each bag. Therefore, the shortage as reveale d between the loading of 1156 bags and delivery of 1107 bags of rice is covered by Section 81 of the Railway Claims Act as well as para-1718, 1721, 1722 of the Indian Railway Commercial Manual, Volume-II.

Coming to para-1836 of the said Manual which is referred to 'said to contain' ba sis, it prescribes as follows:

1836. In respect to a 'said to contain' receipt, the consignee/endorsee may be permitted to pass remarks in the goods delivery book for the actual number of ba gs, etc., delivered to him; remarks regarding the actual shortage should not be allowed to be passed in such cases. In other words, a remark as delivered &. Pa ckages short', etc., should not be allowed.

25. Owing by the provisions contained in para-1836, it was incumbent on the part of the Railway authorities to permit the respondent No.1 to pass remarks in the goods delivery book and the actual numbers of bags delivered. In the prese nt case in hand, it appears that the Railway administration has flouted the said rules by not permitting the respondent No.1 to make endorsement as provided und er para-1836 but instead the Railway authorities made remarks on the 'tally book ', which was their own document and not an entry made by the respondent No.1.

26. In view of the entry made in the true copy of the tally book produced by the Railway authorities, the entry in the reply letter dated 12.04.2000 given b

y NF Railway to the respondent No.1 that the consignment was received on destination on 9.9.1999 is found to be contradictory and did not reflect the true state of affairs and therefore, no reliance can be placed on contents of the aforesaid letter dated 12.04.2000. The entry made in the tally book about delivery of 1107 bags of rice overrides the entry made in the said letter dated 12.04.2000. Therefore, on an independent assessment of the evidence on record, this Court does not find any infirmity in the findings recorded by the learned Railway Claims Tribunal, Guwahati in deciding the issues No.3 & 4.

27. Hence, as this Court is of the view that as per the Railway receipt, goods were booked at the risk of the Railway, the appellant is required to indemnify the respondent No.1 on account of loss arising out of short delivery of rice. Hence, there is no scope for interference to the impugned judgment and order under appeal.

28. Therefore, the appeal stands dismissed.

29. Parties are left to bear their own costs.

30. Return back the LCR.