1961

The State of Madhya Pradesh
v
Shri Moula Bux and others

M. Hidayatullah J.

of India, does not apply to a Part C State, and only the definition in cl. (b) of the section applies to this State, even though a Part C State. In our opinion, therefore, the decision of the Judicial Commissioner was correct.

Since no other point was urged in this appeal, it must fail, and it is accordingly dismissed with costs. There is no need to pass any order on C. M. P. No. 40 of 1960 by which the respondents asked for amendment of the plaint and addition of the Union Government as a party. The application shall be filed.

Appeal dismissed

1961

May, 5.

THE RIVER STEAM NAVIGATION CO., LT.D

v.

SHYAM SUNDAR TEA CO., LTD.

(P. B. GAJENDRAGADKAR, K. N. WANCHOO AND K. C. DAS GUPTA, JJ.)

Common Carrier—Steamship Company carrying, goods by steamer in main stream—Feeder service by boats in tributary—Goods lost in transit in such service—Liability—Company, if, a common carrier in the feeder service—Test Carriers Act, 1865 (3 of 1865), s. 2.

The question whether a carrier is a common carrier or not has to be decided on its public profession and such profession may be either by public notice or by conduct. It is immaterial if the carrying is limited to particular goods or particular routes or between specified points.

Lane v. *Cotton* 12 Mod. 474; *Ingate v. Christie*, (1950) 3 Car. and K. 61 and *Jhonson* v. *Midland Rly., Co.* (1849) 4 Ex 367, referred to.

1961

The River Setam Navigation Co., Ltd. v. *Shyam Sundar Tea Co., Ltd.*

Consequently, where, as in the instant case, the steamer companies, which were by public profession common carriers in the main stream and invariably agreed, when requested, to arrange for carriage of goods by boats from stations situated on its tributary to the steamer station, accepting goods as indiscriminately as in the steamer service, were sued for loss of goods in the tributary and the High Court, while reversing the finding of the trial court as to the negligence of the companies, affirmed its decree against them on the ground that they were common carriers.

Held, that the decision of the High Court was correct and must be affirmed.

There could be no doubt that the service in the tributary was in the nature of a feeder service to the main route and the public profession made in respect of the latter attached to it.

Held, further, that it was of no consequence that the feeder service yielded no profits.

Nor was regularity or otherwise of the feeder service a relevant consideration.

Law does not require that a common carrier must have a fixed rate for carriage of all goods and the absence of such a fixed rate in the feeder service was wholly immaterial.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 404 of 1957.

Appeal from the judgment and decree dated June 15, 1954 of the Assam High Court in First Appeal No. 23 of 1950.

D. N. Mukherjee, for the Appellants.

B. Sen, P. K. Chatterjee and *P. K. Bose*, for the Respondent.

1961, May 5. The Judgment of the Court was delivered by.

Das Gupta J.

DAS GUPTA, J.—This appeal is from the judgment and decree of the High Court of Judicature in Assam affirming the judgment and decree made by the Subordinate Judge of Upper Assam Districts, in a suit brought by the respondent Shyamsundar Tea Co., Ltd., against the present appellants. The

1961

The River Steam Navigation Co., Ltd.
v.
Shyam Sundar Tea Co., Ltd.

Das Gupta J.

appellant companies are joint owners of Steamer service between Dibrugrah and Calcutta. The main service is along the Brahmputra River. Desang is one of the tributaries of the Brahmputra and meets the main stream at Desangmukh Ghat. The plaintiff's case in the plaint was that the defendant companies as common carriers received goods at Dillibari Ghat which is situated on the Desang about 70 miles up-stream from Desangmukh Ghat for carriage "therefrom by boats to Desangmukh Ghat and then by their steamers to different stations on payment of freight". It is further the plaintiffs case that on September 10, 1946, the plaintiff company delivered 120 chests of tea to the defendants at Dillibari Ghat for carrying therefrom and delivery of the same at Kidderpore in Calcutta. The boat carrying these tea chests sank; the tea chests were lost and could not be salvaged. The accident was, according to the plaintiff, due to the negligence on the part of the defendant companies' agents and servants. On this ground of negligence as also on the ground that the companies as common carriers were liable to make good the loss whether or not there was negligence, the plaintiff claimed the sum of Rs. 16,224-12-0 as compensation for the loss.

The defendants raised a four-fold defence. The first contention was that there was no delivery to the defendants at all at Dillibari Ghat and the defendants did not undertake any carriage of the goods from Dillibari Ghat. Secondly, it was said that the sinking of the boat was not due to any negligence on the part of the defendants' servants. The third contention was that the defendants were not a common carrier in respect of carriage of goods from Dillibari Ghat to Desang. Lastly it was pleaded that in any case the conditions of the Forwarding Note which was executed by the plaintiff company completely absolved the defendants from all liability.

The trial Court held on a consideration of the evidence that the goods were delivered by the plaintiff to the defendants at Dillibari Ghat for carriage from there to Kidderpore, Calcutta. It also held that the sinking of the boat was due to negligence on the part of the defendants' servants. Accordingly, without coming to a clear conclusion whether the defendants were common carriers or not in respect of this contract of carriage the Trial Court gave the plaintiff a decree for the sum as claimed.

On appeal the High Court of Assam affirmed this decree, though not for quite the same reasons. The High Court agreed with the Trial Courts' conclusion that there was delivery of the goods to the defendants by the plaintiff at Dillibari Ghat for carriage therefrom. On the question whether the sinking of the boat was due to the negligence of the defendants' servants the learned Judges of the High Court did not however accept the Trial Court's view. Their opinion, it appears, was that the plaintiff had not been able to establish the case of negligence on the part of the defendant's servants. The High Court however came to the conclusion that the defendants undertook this carriage from Dillibari Ghat in their capacity as common carriers and so the question whether there was negligence or not was irrelevant. The High Court also found that the terms and conditions of the Forwarding Note did not in any way absolve the defendants from liability. Accordingly, the High Court affirmed the decree made by the Trial Court.

It may be mentioned that though on both the points, viz., whether the delivery of the goods at Dillibari was to the defendants and whether the defendants were, for such carrying from Dillibari, common carrier, one of the learned judges, Ram Labhaya, J. appears to have been hesitant in coming to his conclusion but ultimately on both these points he agreed with the Chief Justice and

1961

The River Steam Navigation Co., Ltd.
v.
Shyam Sundar Tea Co., Ltd.

Das Gupta J.

the agreed conclusions of both the learned judges were, as we have mentioned above.

The High Court gave a certificate under Art. 133(1)(c) of the Constitution and on that certificate the present appeal has been brought.

On behalf of the appellants Mr. Mukherjee has tried to persuade us to examine the findings of the Courts below that the plaintiff delivered the tea chests in question to the defendants at Dillibari Ghat. He tried to show that it was Mecneill and Company who used to run this boat service from Dillibari to Desangmukh and that the defendants had nothing to do with this business. Apart from the fact that such a case that Macneill and Company used to carry on an independent boat service business to Desangmukh was not made in the plaint, we are satisfied that there is nothing that would justify us to depart from the well established practice of this Court not to interfere with concurrent findings of facts, of the Trial Court and the first court of appeal. We may however indicate that having been taken through the evidence we have no hesitation in stating our agreement with that finding, viz., that the plaintiff delivered the tea chests in question to the defendants at Dillibari Ghat for carriage therefrom. We see no reason also to interfere with the High Court's findings that the plaintiff has not been able to establish its case of any negligence on the part of the defendants' agents.

This brings us to the main question in controversy, viz., whether the appellants were common carriers of goods between Dillibari Ghat and Calcutta. The appellants admit that they are common carriers between Desangmukh Station and all other places on its steamer routes. They contend however that that does not make them common carrier between Dillibari Ghat or other places not in its steamer service route, to any places on the steamer service route. 'The respondent' secase, on the other

hand, is that once it is established that the defendants are common carriers within the meaning of the definition in the Carriers Act, they must be held in law to be common carriers whenever they undertake carriage of goods, unless with respect to the particular carriage they show definitely that they did not act as common carriers.

The Carriers Act, 1865 (Act III of 1865) defines "common carrier" in these words :

> " 'Common carrier' denotes a person, other than the Government, engaged in the business of transporting for hire property from place to place, by land or inland navigation, for all persons indiscriminately."

This definition is based on the English common law as regards the common carriers. The common law in England developed from quite early times to make the profession of common carriers a kind of public service ; or as stated by Lord Holt in an early case "a public trust". (Vide *Lane* v. *Cotton*) (1). It is where such a public trust has been undertaken as distinct from a mere private contract that a carrier ceases to be a private carrier but becomes a public carrier or as English law calls "a common carrier." Explaining the distinction between a mere carrier and a common carrier, Alderson B, said in *Ingate and Another* v. *Christis*(2) :

> "Everybody who undertakes to carry for anyone who asks him, is a common carrier. The criterion is, whether he carries for particular persons only, or whether he carries for everyone. If a man holds himself out to do it for everyone who asks him, he is a common carrier ; but if he does not do it for everyone, but carries for you and me only, that is a matter of special contract."

(1) 12 Mad. 474. (2) (1850) 3 Car & K. 61.

1961

The River Steam Navigation Co., Ltd. v. *Shyam Sundar Tea Co., Ltd.,*

Das Gupta J.

The question in any particular case whether the carrier was a common carrier or a private carrier has therefore to be decided on the ascertainment of what he publicly professes. This profession, it need hardly be mentioned, may be by public notice or by actual indiscriminate carrying of goods. It is also clear that the profession to carry goods indiscriminately may be limited to particular goods or to particular routes or even as to two or more specified points. In *Johnson* v. *Midland Rly., Co.*(3) the question arose whether the Railway Company were as common carriers bound to carry coal from Melton Mowbray to Oakham, Parke B, with whom Alderson B, Rolfe B, and Platt B, agreed stated the law thus:

> "A person may profess to carry a particular description of goods only, for instance, cattle or dry goods, in which case he could not be compelled to carry any other kind of goods; or he may limit his obligation to carrying from one place to another, as from Manchester to London, and then he would not be bound to carry to or from intermediate places."

Turning to the facts of the case before him the learned Baron stated:

> "Now, if the defendants stand in the situation of carriers at common law, they are not liable, because it does not appear in evidence that they ever had been a public profession by them that they would carry coals from Melton Mowbray to Oakham."

Ultimately the learned Judge recorded the conclusion thus:

> "I think that the circumstances of their having undertaken to be carriers does not

(3) (1849) 4 Ex. 367.

bind them to carry from or to each place on the line, or every description of goods."

This is good authority for the appellants' contention that the mere fact that they are engaged in the transport of goods from certain places on their Steamer Service to other places does not necessarily justify the conclusion that whatever carriage they may undertake elsewhere is also done as a common carrier. It is therefore necessary to examine the nature of the public profession made by the appellants with regard to the carriage of goods from Dillibari Ghat. It is true, as pointed out by the appellants' counsel that there is no public notice, as there is in respect of places on the Steamer Service route, with regard to carriage from Dillibari Ghat. It is legitimate however to consider in this connection the usual conduct of the appellant companies in connection with carriage from Dillibari Ghat and other surrounding circumstances. It has to be noticed that tea gardens which supply the bulk of the companies' cargo traffic for its despatch steamers find it convenient and economical to bring their goods to the nearest point on some river and to enter into contracts of carriage of goods from these points to places on the Steamer Service routes. It appears clear from the evidence adduced in this case that for such carriage the tea gardens make requests to the appellants to arrange for carriage to the Steamer station and the companies invariably comply with such requests.

Their own witness, the Joint Agent at Dibrugarh, has said in this connection "We always try to give facilities to the interior tea gardens and to all customers whenever they require any help." He has not said a single word as to requests of any customers for arrangements of carriage from Dillibari Ghat having been refused. Indeed, when one remembers that it is by getting the custom from these interior tea gardens, not all of which are situated on or near the main stream of the

1961

The River Steam Navigation Co., Ltd.
v.
Shyam Sundar Tea Co., Ltd.

Das Gupta J.

Brahmputra that the companies are able to get sufficient cargo for their steamers, it was only natural that they would accept goods for carriage from places away from the main stream as indiscriminately as they do for carriage from stations on the main steamer route.

The defendants' witness Mohammad Abdulla who is their Ghat Supervisor at Desangmukh has stated that "the Steamer Company bears expenses of the clearance of the rivers to make them navigable." Such conduct is consistent only with the case that the companies are anxious to receive whatever cargo they get for carriage from places on the river Desang and other tributaries to stations on the main steamer route for further carriage on the steamer route. The service on these tributaries can therefore be reasonably described as a "feeder service" for the main route and the admitted public profession for indiscriminate carriage of the goods of every person on the main route cannot but attach to the service on these "feeder routes" also.

Against all this, Mr. Mukherjee pressed for our consideration three circumstances: (i) that the rate for carriage from Dillibari was not a fixed rate; (ii) that there was no regular service but boats were supplied only on requisition; and (iii) that the carriage was made without profit.

Nothing turns on the third fact—assuming that it has been established—that carriage from Dillibari to Desangmukh is made without profit. If this is actually the case it is obvious that the defendants deliberately do this as a part of their business so as to attract good business on the main steamer service route where they hope to make sufficient profits to make up for the loss in feeder service.

The circumstance that there was no regular

service but boats were supplied only on requisition is also wholly irrelevant for ascertaining whether there was a public profession to carry indiscriminately. Even if there was a regular service, there might not be a profession to carry indiscriminately; whereas even if there was such a profession it would not necessarily happen that regular service should be maintained. If, as the evidence appears to establish, the companies were ready to supply boats whenever requested, without picking and choosing, that would be sufficient public profession to act as a common carrier.

Nor is the fact that there was no fixed rate for carriage of goods from Dillibari to Desangmukh of any assistance to the appellants' contention that they were not common carriers, for the law does not require that a common carrier must have one and the same rate for all goods. The law was stated thus by Blackburn J. in *G. W. Ry. Co.*, v. *Sutton* (4):

> "There was nothing in the common law to hinder a carrier from carrying for favoured individuals at an unreasonably low rate, or even gratis. All that the law required was, that he should not charge any more than was reasonable."

"The requirement of equality of charges", as pointed out by Prof. Otto Kahn-Fre-und in the law of Carriage by Inland Transport (3rd Edition) at p. 190, "in so far as it existed, was entirely the creation of statute while the common law regards nequality as nothing more than possible evidence of iunreasonableness."

That there was no fixed charge for carriage from Dillibari cannot therefore be any reason to think that the appellants were not common carriers in respect of carriage from Dillibari.

(4) (1869) L.R., 4 H.L. 226 at. 237.

1961

The River Steam Navigation Co., Ltd.
v.
Shyam Sundar Tea Co., Ltd.

Das Gupta J.

The next argument of Mr. Mukherjee was almost an argument of despair. He points out that there was a Forwarding Note (Ex. B) executed by the plaintiff in respect of the journey from Desangmukh to Calcutta and there was a special contract there limiting the carriers' liabliity. If the appellants were really common carriers in respect of the carriage from Dillibari, is it conceivable, he asks, that there would not be a similar Forwarding Note covering the carriage from Dillibari to Desangmukh? That however is a totally wrong approach to the problem. A common carrier may restrict his liability by special contract. But the absence of a special contract cannot show that he is not a common carrier. The fact that the appellants did not take care to make a special contract in respect of carriage from Dillibari is therefore wholly irrelevant.

On a consideration of the entire evidence therefore we are of opinion that the appellants did profess by their conduct, even if not by any public notice, that they would carry goods indiscriminately for all those who ask for such carriage from Dillibari to various places on their main steamer route. They were thus common carriers in respect of the carriage of the plaintiff's goods from Dillibari.

A last contention was raised, again, on the Forwarding Note. It was urged that in any case this should be interpreted as covering the carriage from Dillibari also. In terms the Forwarding Note was limited to the contract of carriage as from Desangmukh to Calcutta. By no method of construction of the document can it be extended to the journey from Dillibari.

All the contentions raised in the appeal therefore fail. The appeal is accordingly dismissed with costs.

Appeal dismissed.