Before Satish Kumar Mittal, J

FERTILIZER CORPORATION OF INDIA LTD,—*Plaintiff/Appellant*

versus

UNION OF INDIA & ANOTHER,—*Respondents*

R.F.A. NO. 1809 OF 1979

5th November, 2003

Indian Railways Act, 1890—Ss. 73, 74 & 78(c)(ii) shortage in the delivery of goods by the Railways—Claim to damages for the loss—General strike in the Indian Railways at the relevant time—S. 78(c)(ii) provides that the Railway Administration shall not be responsible for the loss, destruction, damage, deterioration or non-delivery of goods proved by it to have been caused by or to have arisen from riot, civil commotion, strike, lock out, stoppage or restraint of labour from whatever cause whether partial or general—Trial Court holding the Railways not liable to pay compensation on account of protection available to it u/s 78(c)(ii)—S. 73 provides that the Railway Administration is liable for the loss, destruction, damage, deterioration or non-delivery in transit of goods delivered to it unless it proves any of the causes enumerated in Cls. (a) to (i) of S. 73—Railway Administration failing to establish that the loss in question was caused by the said strike—Merely because the loss has occurred during the strike period it cannot be presumed that the same was proved to have been caused by the strike—S. 74 provides that if the goods were booked at owner's risk then Railway Administration shall not be responsible for any loss caused to such goods—Railway Administration failing to establish that the goods were booked at owner's risk—Railway Administration is not entitled for protection available to it u/s 78(c)(ii)—Appeal allowed while decreeing the suit of the corporation for recovery.

Held, that the railway administration is not entitled for the protection available to it under Section 78(c)(ii), because it has only proved that during the transit period, there was a general strike but it did not lead any evidence to establish that the loss in question was caused by the said strike. The learned trial Court has only held that the alleged loss was caused during the strike period. Merely because

the loss has occurred during the strike period, it cannot be presumed that the same was proved to have been caused by the strike. Therefore, the railway administration was not entitled for the protection available to it under S. 78(c)(ii) of the Act.

(Para 16)

Further held, that the railway administration was not entitled to take benefit of Section 74 of the Act. To take benefit under this Section, it was for the railway administration to establish that the goods were booked at the owner's risk. Though it is correct that the Corporation did not plead that the goods in question were booked at the railway risk, but it is for the respondent—Railway administration to prove that the goods were booked at owner's risk, if they want to plead the defence available to them under Section 74 of the Act.

(Para 17)

Munishwar Puri, Advocate, *for the appellant.*
None for the *respondents.*

JUDGMENT

SATISH KUMAR MITTAL, J.

(1) Fertilizer Corporation of India Limited (hereinafter referred to as the appellant—Corporation) has filed this Regular First Appeal against the judgment and decree dated 15th June, 1979 passed by the learned trial court,—*vide* which its suit for recovery of Rs. 39,835.66 for short delivery of goods as damages against the defendants, respondents herein, was dismissed.

(2) The brief facts of the case are that 300 bales of 100 bags each were despatched by respondent No. 2,—*vide* Railway Receipt dated 4th May, 1974 from Cossipore to Nangal Dam for delivery of the same to the appellant—Corporation at Railway Station, Nangal Dam. On 22nd May, 1974, the appellant-Corporation was delivered the goods. On checking, it was found that the consignment contained only 222 bales instead of 300 bales. Therefore, 78 bales containing 7800 bags were being delivered short to the appellant—Corporation by the Railway Authorities. The appellant—Corporation alleged that the loss of the goods had occurred due to negligence on the part of

the railway authorities, therefore, they claimed damages for the loss by giving notice under Section 78(b) of the Indian Railways Act, 1890 (hereinafter referred to a 'the Act.'). When the said claim was not satisfied, the appellant—corporation filed the instant suit for recovery of Rs. 39,835.66 i.e. Rs. 27,732.12 on account of price of 7800 bags, Rs. 831.96 on account of Central Sales Tax, Rs. 726.58 on account of freight charges and Rs. 10,545 on account of interest.

(3) Respondent No. 1 contested the aforesaid suit. It was pleaded that the railway authorities were not negligent in causing the alleged loss. If there was any shortage, that was due to the negligence of the sender as loading and unloading was the responsibility of the owner. Respondent also took the defence and protection as available to it under the provision of Section 78(c)(ii) of the Act, as it was alleged that when the goods were in transit, there was general strike due to which station remained closed from 8th May, 1974 to 21st May, 1974.

(4) On the pleadings of the parties, the learned trial court framed the following issues :—

(1) What amount of compensation on account of short delivery of 78 bales of 100 bags each is the plaintiff entitled to recover ? OPP

(2) Whether the plaintiff is entitled to interest ? If so how much ? OPP

(3) Whether the plaintiff has locus standi to file this suit ? OPP

(4) Whether the defendant No. 1 is protected U/s 78-C (2) of the Indian Railways Act ? If so, to what effect ? OPD

(5) Whether the suit is within time ? OPP

(6) Whether the notice u/s 80 C.P.C. served on the defendants is valid ? OPP

(7) Whether the notice served on the defendants u/s 79 of Indian Railways Act is valid ? OPP

(7-A) Whether the plaint has been signed, verified and instituted by a competent and authorised person ? OPP

8. Relief.

(5) Issues No. 1 and 4 were decided together by the learne trial court. On these issues, the short delivery of 78 bales containir 7800 bags was not disputed. However, the question was raised whethe the railway authorities was liable to pay compensation to the appellar for the short delivery of the aforesaid goods or not. The contentic of the contesting respondent was that when the goods were in transi there was a general strike in the Indian Railways. Due to that reaso if any loss of the goods has occurred, then the respondent was n liable to pay compensation for short delivery of goods, as it is protecte under Section 78 (c) (ii) of the Act. It was further contended by th respondent that it was not the case of the appellant—Corporation tha the goods in question were booked by it at railway risk. Therefor it was contended that the respondent was fully protected by th provisions contained in Section 78 (c) (ii) of the Act which provide that the railway administration shall not be responsible for the los destruction, damage, deterioration or non-delivery of goods proved b the railway administration to have been caused by or to have bee arisen from riot, civil commotion, strike, lock-out, stoppage or restrair of labour from whatever cause whether partial or general.

(6) The learned trial court accepted the aforesaid contentio of the respondent and held that there was a general strike in th Indian Railways from 8th May, 1974 to 27th May, 1974 and durin that period, the goods were transited. Therefore, it was to be hel that the loss in question was caused due to the general strike i the Indian Railways. In this regard, the learned trial court observe as under :—

> "Thus from the above mentioned statements of the witnesse examined by the defendant there remain no doubt tha there was general strike in Indian Railways from 8t May, 1974 to 22nd May, 1974. The Railway statio Kalubathan was closed during the strike period. Th seals of the wagons in which goods in dispute are bein transported alleged to have been damaged at thi railway station. During the strike period the railwa station was under the control of the security staff. Th security staff was guarding the railway station property It is also not the case of the plaintiff that there was n general strike in the Indian Railways as is the case o

defendant No. 1, but it is argued by the learned counsel for the plaintiff that the defendant can not claim benefit of Section 78-C(ii) of the Indian Railways Act because the strike was illegal. There is no sufficient evidence on record that the strike was illegal. More over, in section 78-C(ii) it is no where mentioned that strike should be legal one. Thus in my opinion, the case of the plaintiff is covered by the provisions of section 78-C(ii) of the Indian Railways Act and due to strike in the Indian Railways at the relevant time, defendant No. 1 is not responsible for short delivery of bales of jute bags. Hence the plaintiff is not entitled to claim compensation. Hence both the issues are decided against the plaintiff and in favour of defendant No. 1."

(7) In view of the decision on issues No. 1 and 4, issue No. 2 was also decided against the appellant Corporation. After recording the aforesaid findings, suit of the appellant-Corporation was dismissed. However, on issue No. 3, it was held that the appellant-Corporation was having *locus standi* to file the suit ; on issue No. 5 it was held that the suit was within limitation and issues No. 6,7 and 7-A were also decided in favour of the appellant-Corporation. Against this judgment and decree, the instant Regular First Appeal has been filed by the appellant-Corporation.

(8) The sole question involved in this appeal is regarding the protection of the railway authorities under Section 78 (c) (ii) of the Act from paying compensation to the appellant-Corporation for the loss caused to it due to short delivery of goods.

(9) Learned counsel for the appellant-Corporation has submitted that the learned trial court has proceeded on two wrong presumptions, which have been drawn against the appellant-Corporation. Firstly, that it will be presumed that the goods were booked at the owner's risk because it was not pleaded and proved by the appellant-Corporation that the goods in question were booked at railway risk. Secondly, that when it was proved by the respondent that there was a general strike in the Indian Railways during the days when the goods in dispute were being transported from Cossipore to Nangal Dam, then the Indian Railway shall not be liable to pay compensation to the appellant-Corporation for short delivery on account

of protection available to it under Section 78 (c)(ii) of the Act, because then it will be presumed that the loss was caused due to the said strike. Learned counsel for the appellant-Corporation submitted that the respondents in the instant case did not lead any evidence to prove that actually the loss in question was caused due to the strike, but only it has been proved that there was a general strike in the Indian Railways during the relevant period when the loss was caused. Learned counsel submitted that the entire approach of the learned trial court was wholly erroneous and the suit of the appellant-Corporation was dismissed on wrong presumptions drawn by the learned trial court in respect of the aforesaid two material facts. Hence, the respondent was not at all entitled for any protection under Section 78 (c)(ii) of the Act and suit of the appellant-Corporation should have been decreed.

(10) I have heard the arguments of learned counsel for the appellant-Corporation and have perused the record of the case. In my opinion, the appeal deserves to be allowed. In the instant case, the short delivery of goods to the appellant-Corporation by the railway administration has not been disputed. It is also not disputed that the aforesaid loss occurred during the course of transit. The only question which is required to be determined is whether the railway administration is liable to pay compensation for the said short delivery or whether it was entitled for protection under Section 78 (c) (ii) of the Act. To appreciate and determine the controversy in the instant case, it is necessary to refer some of the relevant provisions of the Act.

(11) Section 73 of the Act pertains to general responsibility of a railway administration as a carrier of animals and goods, which reads as under :—

> 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 or non-delivery, in transit, of animals or goods delivered to the administration to be carried by railway, arising from any cause except the following, namely :—
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> (a) act of God ;
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> (b) act of war ;
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> (c) act of public enemies ;

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

(e) orders or restrictions imposed by the Central Government or 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) latent 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 or 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 railway administration further proves that it has used reasonable foresight and care in the carriage of the animals or goods.

(12) From the aforesaid provision, it is clear that the railway administration is liable for the loss, destruction, damage, deterioration or non-delivery, in transit, of goods delivered to it unless it proves any of the causes enumerated in clauses (a) to (i) of Section 73 of the Act. A complete reading of this Section further makes it clear that even in case the loss etc. is proved to have caused due to any of the causes enumerated in clauses (a) to (i), the railway administration will remain liable until it proves that it has used reasonable foresight and care. In the instant case, none of the defences available to the railway administration in this Section has been pleaded by the respondent.

(13) Section 74 of the Act provides for responsibility of a railway administration for animals or goods carried at owner's risk note. This Section reads as under :

> 74. Responsibility of a railway administration for animals or goods carried at owner's risk note.(1). When any animals or goods are tendered to a railway administration for carriage by railway and the railway administration provides for the carriage of such animals or goods either at the ordinary tariff rate (in this Act referred to as the railway risk rate) or in the alternative at a special reduced rate (in this Act referred to as the owner's risk rate), the animals or goods shall be deemed to have been tendered to be carried at owner's risk rate, unless the sender or his agent elects in writing to pay the railway risk rate.
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> (2) Where the sender or his agent elects in writing to pay the railway risk rate under sub-section (1), the railway administration shall issue a certificate to the consignor to that effect.
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> (3) When any animals or goods are deemed to have been tendered to be carried, or are carried, at the owner's risk rate, then,notwithstanding anything contained in section 73, the railway administration shall not be responsible for any loss, destruction, damage, deterioration or non-delivery, in transit of such animals or goods, from whatever cause arising, except upon proof that such loss, destruction, damage, deterioration or non-delivery was due to negligence or misconduct on the part of the railway administration or of any of its servants.

(14) Section 73 of the Act enacts the general responsibility of Railway as a carrier of animals and goods and Sectioin 74 (3) of the Act carves an exception to the general rule when the goods or animals are booked at ower's risk rate. If the goods or animals were booked at owner's risk, then railway administration shall not be responsible for any loss, destruction or damage caused to such goods or animals during the course of transit, except when it is proved that such loss or destructioin was caused due to negligence or mis-conduct on the part of the railway administration or any of its servants. The burden of proof of negligence on the part of the railway is on the person

claiming damages. Section 74 of the Act pertains to only liability of the railway administration in respect of the goods or animals when the same were booked at the owner's risk but if such goods or animals were booked at railway risk or when railway administration does not offer to provide for carriage of such goods at the ordinary tariff rate i.e. railway risk rate, then the railway administration is liable for the loss or damage caused to the same during the course of transit.

(15) Section 78 of the Act pertains to exoneration from responsibility in certain cases, which reads as under :—

> 78. Exoneration from responsibility in cerain cases. Notwithstanding anything contained in the foregoing provisions of this Chapter, a railway administration shall not be responsible :—
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> (a) for the loss, destruction, damage, deterioration or non-delivery of any goods with respect to the description of which an account materially false has been delivered under sub-section (1) of sectioin 58, if the loss, destruction, damage, deterioration or non-delivery is, in any way, brought about by the false account, nor in any case for an amount exceeding the value of the goods if such value were calculated in accordance with the description contained in the false account ; or
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> (b) for the loss, destruction, damage, deterioration or non-delivery of animals or goods in cases where there has been fraud practised by the consignor or the consignee or an agent of the consignor or the consignee ; or
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> (c) for the loss, destruction, damage, deterioration or non-delivery of animals or goods proved by the railway administration to have been caused by or to have arisen from—
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> (i) improper loading or unloading by the consignor or the consignee or by an agent of the consignor or the consignee, or
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> (ii) riot, civil commotion, strike, lock-out, stoppage or restraint of labour from whatever cause, whether partial or general ; or
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> (d) for any indirect or consequential damages or for loss of particular market.

(16) In the instant case, the railway administration is claiming protection under Section 78 (c) (ii) of the Act which provides that the railway adminstration shall not be responsible for the loss, destruction, damage, deterioration or non-delivery of animals or goods **proved by the railway administration to have been caused by or to have arisen from riot, civil commotion, strike, lock-out, stoppage or restraint of labour from whatever cause, whether partial or general.** In my opinion, the railway administration is not entitled for the protectioin available to it under the said clause, because it has only proved that during the transit period, there was a general strike but it did not lead any evidence to establish that the loss in question was caused by the said strike. The learned trial court has only held that the alleged loss was caused during the strike period. Merely because the loss has occurred during the strike period, it cannot be presumed that the same was proved to have been caused by the strike. Therefore, in my opinion, the railway administration was not entitled for the protection available to it under the aforesaid clause.

(17) Further, I am of the opinion that in the instant case, the railway administration was not entitled to take benefit of Section 74 of the Act. To take benefit under this Section, it was for the railway administration to establish that the goods were booked at the owner's risk. Learned trial court has held that if the appellant—Corporation has not pleaded and proved that the goods were booked at the railway risk, then it will be presumed that the same were booked at the owner's risk. Learned trial court recorded the said finding on the basis of the decision of the Patna High Court in **firm Mahadeolal Bhagirathmal** *Versus* **Union of India, (1)** In my opinion, the view taken by the learned trial court is erroneous. Though it is correct that the appellant—Corporation did not plead that the goods in question were booked at the railway risk, but it is for the respondent—railway administration to prove that the goods were booked at owner's risk, if they want to plead the defence available to them under Section 74 of the Act.

(18) In **Union of India** *versus* **Sadhu Ram, (2)** it was held that in a case against a Railway for damages for destruction or deterioration of the goods, an inference that the consignment must be deemed to have been tendered to be carried at the owner's risk rate cannot be drawn from the mere omission of the plaintiff to plead or prove that the consignment has been booked at the ordinary tariff rate. It is for the Railway to plead and prove that both the railway

(1) AIR 1968 Patna 440
(2) AIR 1967 Patna 425

risk and the owner's risk rate were available to the consignor for the carriage of article in question before they can rely upon the exceptional provision of Section 74 of the Act. In case the railway administration fails to plead and prove that two rates of tariff have been provided for, the carriage of the goods in question, it is liable in terms of the general responsibility as a carrier of goods as laid down in Section 73 of the Act and the damage, loss or destruction of the goods can be attributed to the negligence or misconduct on the part of the Railway without requiring the plaintiff to further prove the specific act or omission of the railway servants concerned constituting negligence or misconduct.

(19) similarly, in **M/s Madurai K. Rengiah Chettiar and Co. Madurai** *versus* **Union of India, (3)** it was held as under :—

> "Section 74 of the Railways Act enumerates such rates and raises a fiction that ordinarily the presumption is that the goods should have been tendered to be carried at owner's risk unless there is an election by the sender in writing to pay the railway risk rate. It appears however from the language of the section that it is for the railway administration to establish that there were two rates as above available at the station of despatch. No doubt, the contention of the counsel in that behalf is well founded and has to be accepted. This is also the view of the **Patna High Court in Union of India** *versus* **Sadhuram,** AIR 1967 Pat 425.

(20) In the instant case, there is no evidence which establish that there were two rates i.e. railway risk rate and owner risk rate, available at the station of despatch. In view of the aforesaid judgments, I am of the opinion that the railway administration—respondent was not entitled for any benefit under Section 74 of the Act.

(21) In view of the aforesaid discussion, the instant appeal is allowed with costs. The impugned judgment and decree passed by the learned trial court is set aside and suit of the appellant—Corporation for recovery of Rs. 39,835.66 is decreed with interest at the rate of 6% per annum from the date of institution of the suit till the date of its recovery.

R.N.R.

3) AIR 1971 Madras 34