

A

KUCHWAR LIME AND STONE CO.

v.

M/S. DEHRI ROHTAS LIGHT RAILWAY CO. LTD. & ANR.

July 15, 1968

B

[J. C. SHAH AND V. BHARGAVA, JJ.]

Railway freight and demurrage—consignment booked 'freight to pay'—Whether consignee liable to pay after refusing to accept consignment.—Railway not unloading consignment for seven months—if entitled to demurrage for full period or obliged to unload and claim demurrage only for reasonable period.

C

A quantity of coal was booked by a Colliery to the appellant Company carriage to Banjari station on the respondent Railway's line and the freight on the consignment was to be paid by the appellant Company. The Company declined to take delivery of a part of the consignment which reached Banjari on November 12, 1954. After some correspondence between the parties as well as with the Coal Controller, the Railway sold the coal on June 2, 1955, after serving a notice on the appellant. It thereafter filed a suit against the Company claiming demurrage for 202 days during which

D

six wagons in which the coal was loaded were detained and sought a decree for Rs. 17,625/14/- after giving credit for the amount realised from the sale of the coal. The trial court granted a decree for about Rs. 1,620/- with interest, but in appeal the High Court decreed the Railway's claim in full.

E

In the appeal to this Court by certificate, it was contended on behalf of the appellant (i) that the Company being a consignee of the goods booked by the Colliery there was no privity of contract between the Company and the Railway and no claim for demurrage or freight lay at the instance of the Railway against the Company; and (ii) that in any event the Railway ought to be awarded demurrage for only 22 days out of the total period for which the wagons were detained.

F

HELD: (i) At the material time the sale and delivery of coal were controlled under the Colliery Control Order 1945; the supply of the coal in the present case was sanctioned by the Deputy Coal Commissioner to be made to the appellant Company and an order was also made by him in favour of the Company for priority supply of wagons to carry the coal to Banjari. In these circumstances it would be reasonable to infer that the Colliery acted as an agent for the Company in entering into the contract of consignment and the liability for payment of freight and of demurrage charges for failure to take delivery of the goods lay upon the Company. [361 E-F, 363 D-E]

G

There was no force in the contention that it is only in those cases where delivery of goods is taken by the consignee that the liability to pay demurrage may be imposed upon him. Even where the consignee does not ultimately take delivery, if the wagon is detained for his benefit, normally the Railway would be entitled to hold him liable for demurrage. [363 G]

H

(ii) The High Court was in error in holding that the Company was liable to pay demurrage for the full period of 202 days. As the wagons containing the coal reached Banjari on November 12, 1954 and before that date and thereafter the Company had declined to take delivery of

the coal, the Railway could have exercised its power to sell the coal under s. 56 of the Railways Act. The Railway was in the position of a bailee *qua* the Company and was bound to minimise the loss : it could not unreasonably detain the wagons and claim demurrage. Even assuming that in view of the Colliery Control Order, the Railway could not sell the coal without the Coal Commissioner's sanction, it could have unloaded the coal from the wagons and put the wagons to use. After the wagons were unloaded the consignee could be liable only for wharfage. [363 H-364 C]

On the facts in the present case the respondent Railway was entitled to demurrage for the detention of wagons for only one month.

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 987 and 988 of 1965.

Appeals from the judgment and decree dated July 25, 1962 of the Patna High Court in Appeals from Original Decree Nos. 210 and 230 of 1968.

S. V. Gupte, and *P. K. Chatterjee*, for the appellant (in both the appeals).

R. Gopalakrishnan, for respondent No. 1 (in both the appeals).

K. K. Sinha, for respondent No. 2 (in both the appeals).

The Judgment of the Court was delivered by

Shah, J. The East Keshalpur Colliery—hereinafter called 'the Colliery'—booked, in the months of July—August 1954, a consignment of steam coal at the Kusunda railway station on the Eastern Railway for carriage by rail to the Banjari station on the Dehri Rohtas Light Railway. The coal was consigned to the Kuchwar Lime & Stone Company—hereinafter called 'the Company'—and the company was to pay the freight. Out of the five wagons in which the coal was loaded three reached Banjari and coal was delivered to the Company, and no dispute arises with regard to those three wagons in these appeals. The contents of the remaining two wagons weighing 60 tons were reloaded *en-route* into six smaller wagons of the Dehri Rohtas Light Railway hereinafter called 'the Railway'. The consignment reached Banjari railway station on November 12, 1954. The Company declined to accept the consignment. There was thereafter correspondence between the Railway Administration, the Coal Controller, the Colliery and the Company. Ultimately the Railway Administration served a notice on April 28, 1955, on the Company and the Colliery that they intended to sell the coal of which delivery was not taken, and on June 2, 1955, the coal was sold for Rs. 1,050. Claiming that it was entitled to demurrage for 202 days during which its wagons were detained at the rate of Rs. 90 per day, the Railway filed an action against the Colliery and the Company in the Court of the Subordinate Judge, Sasaram, for a decree for Rs. 17,625/14 being the charges for demurrage and

A freight payable in respect of the consignment less Rs. 1,050 realised from sale of the coal. The suit was decreed by the Subordinate Judge against the Company for Rs. 1,620/10 with interest thereon at the rate of 6% per annum from December 19, 1957 till realization and proportionate costs. The suit was dismissed against the Colliery.

B Against the decree, the Company and the Railway appealed to the High Court of Patna. The High Court modified the decree passed by the Trial Court and decreed the claim of the Railway against the Company in full. With certificate granted by the High Court under Art. 133(1)(c) of the Constitution these two appeals have been preferred by the Company which have been consolidated for trial.

C Two contentions are raised in support of these appeals.

(1) that the Company being a consignee of the goods booked by the Colliery there was no privity of contract between the Company and the Railway and no claim for demurrage or freight lay at the instance of the Railway against the Company; and

(2) that in any event the Railway ought to be awarded demurrage for only 22 days out of the total period for which the wagons were detained.

E At the material time coal was a controlled commodity : supply and delivery of coal could be made only under orders issued by the Coal Controller. Sale and delivery of coal were governed by the Colliery Control Order, 1945 issued under Rule 81 of the Defence of India Rules and continued under the Essential Supplies (Temporary Powers) Act, 1946, and the Bihar Coal Control Order, 1947. It was common ground that coal could not be sold by a Colliery except under an order of the Coal Commissioner or his Deputy. On July 13, 1954, the Deputy Coal Commissioner (Distribution) issued an order addressed to the Divisional Superintendent, Eastern Railway, sanctioning the supply of 110 tons of steam coal by the East Keshalpur Colliery to the Company. By that order a priority supply of wagons was also sanctioned in favour of the Company for transport of coal to the Banjari railway station. It was also recorded in the order that the quantity of coal mentioned in the order "had been sanctioned on the account of the Company" and that sanction for priority supply of wagons had also been accorded, and the Company was advised to instruct the Colliery to indent for wagons accordingly and to quote the sanction number given in the order when so indenting. Copies of the order were sent to the Colliery and the Company. Pursuant to the allotment of coal an order was placed on July 14, 1954 by the Coal Suppliers Ltd. acting on behalf of the Company, for supply of steam coal to the Com-

pany at Banjari railway station. In July and August forwarding notes were submitted by the Colliery for despatch of steam coal III-B to the Company. The Company received three wagons of coal sometime in August 1954. The Company was not satisfied with the quality of coal supplied, and made complaints in that behalf to the Colliery by their letters dated August 18, 1954 and September 1, 1954. The balance of the consignment reached Banjari on November 12, 1954, but the Company declined to take delivery and intimated the Colliery and the Railway by their letter dated November 23, 1954 that it was not liable for loss resulting from the detention of wagons. On November 30, 1954 the Company wrote a letter to the Deputy Coal Commissioner (Distribution) requesting that the Coal Controller, Bihar, be moved to sanction disposal of coal of which delivery was not taken. A copy of the letter was sent to the Company. On January 24, 1955 the Railway wrote to the Coal Area Superintendent, Eastern Railway, intimating that the Company had refused to take delivery of coal, and asked for immediate instructions of the Colliery for its disposal. On February 21, 1955 the Railway again wrote to the Coal Area Superintendent stating that the goods will be sold by auction if nothing heard from him within a fortnight from that date. On April 28, 1954, the Railway informed the Company that they had decided to dispose of the consignment of coal under the Indian Railways Act by public auction and claimed that they were entitled to demurrage which had accrued due till then. On May 13, 1955, the Coal Controller Bihar, advised the Railway to dispose of the coal lying undelivered "according to prevailing railway rules" by public auction. The Railway thereafter sold the consignment of coal on June 2, 1955.

The Colliery Control Order, 1945, was issued in exercise of r. 81 of the Defence of India Rules and was continued thereafter under the Essential Supplies (Temporary Powers) Ordinance, 1946 which was replaced by the Essential Supplies (Temporary Powers) Act, 1946. By cl. 5 of the Order it was provided that no colliery owner, and no person acting on behalf of a colliery owner, shall sell, agree to sell, or offer to sell, coal at a price different from the price fixed in that behalf under cl. 4. By cl. 6(1) it was provided that where a colliery owner has signified to the Deputy Coal Commissioner (Distribution) in writing his willingness to sell direct to consumers and an allotment is made by the Deputy Coal Commissioner (Distribution) to a consumer with his consent for such direct sale, the coal shall be delivered to the consumer at the price fixed under clause 4. Clause 8 of the order provides that the Central Government may from time to time issue such directions as it thinks fit to any colliery owner in regulating the disposal of his stocks of coal or of the expected output of coal in the colliery during any period including direc-

A

B

C

D

E

F

G

H

- A tions as to the person or class or description of persons to whom coal shall or shall not be disposed of, the order of priority to be observed in such disposal, and the staking of coal on Government account. The order issued by the Coal Controller was in exercise of the power under cl. 8 of the Colliery Control Order. No reference to any specific provision of the Bihar Coal Control
- B Order need be made, because counsel have placed no reliance thereon.

- C Having regard, however, to the circumstances in which the goods were loaded by the Colliery, there can be no doubt that the Colliery was acting as an agent of the Company for the purpose of arranging for transport of coal in which the property had under the orders of the Coal Commissioner passed to the Company. The Colliery arranged to load the coal at the Kusunda Railway station pursuant to the order for supply of coal sanctioned by the Coal Commissioner to the Company in the wagons allotted to the Company for transporting coal to Banjari. It is clear that the Colliery supplied coal in pursuance of the "sanction order" in favour of the Company and arranged to transport
- D it to Banjari in wagons which were allotted for that purpose by order of the Deputy Coal Commissioner. Under the forwarding notes the freight was made payable by the Company. In the circumstances, it would be reasonable to infer that the Colliery acted as an agent for the Company in entering into the contract of consignment and the liability for payment of freight and of demur-
- E rage charges for failure to take delivery of the goods lay upon the Company.

Normally the liability for payment of demurrage charges lies upon the consignee for whose convenience the wagon is detained. As stated in Halsbury's Laws of England, 3rd Edn., Vol. 31, at p. 724 :

- F "The party primarily liable to pay the demurrage is the party for whose convenience the wagons are detained."

- We are unable to accept the argument of Mr. Gupte on behalf of the Company that it is only in those cases where delivery of goods is taken by the consignee that the liability to pay demurrage may be imposed upon him. Even where the consignee does not ultimately take delivery, if the wagon is detained for his benefit, normally the Railway would be entitled to hold him liable for demurrage. We are unable, therefore, to hold that the Company that it was not liable to pay freight or demurrage charges, because the Colliery had entered into the contract of consignment
- H with the Railway.

But in our view the High Court was in error in holding that the Company was liable to pay demurrage for the full period of

202 days. The six wagons containing 60 tons of coal reached Banjari railway station on November 12, 1954. Before that date and thereafter the Company had declined to take delivery of the coal. The Railway had undoubtedly power to sell the consignment of coal under s. 56 of the Railways Act after serving notice upon the owner. But the Railway was, after expiry of a reasonable period which may be necessary for taking delivery, in the position of a bailee *qua* the company and was bound to minimise the loss : it could not unreasonably detain the wagons and claim demurrage. Even granting that in view of the Colliery Control Orders, without the sanction of the Coal Commissioner, the Railway could not sell coal, (on that question we express no opinion) the Railway could have unloaded the coal from the wagons and put the wagons to use. After the wagons were unloaded the consignee could be liable only for wharfage. Under Part I of the Coaching Tariff r. 108 provides for the treatment and disposal of unclaimed articles. Under cl. (2) of r. 108 it is provided that for unclaimed booked articles, wharfage of two annas per maund or part of a maund for 24 hours or part of 24 hours with a minimum charge for one maund is levied, if they are not removed from railway premises within 48 hours from midnight of the day of arrival. By cl. (8) it is provided :

“Public sales by auction will be held from time to time of all unclaimed or lost property which has remained in the possession of the railway for the period mentioned below :—

(i) unclaimed or lost property other than food-grains which has remained in the possession of the railway for over three months;

(ii) unclaimed foodgrains which have remained in the possession of the railway for two months.

At least 5 days previous notice of each auction will be given by advertisement in a newspaper.”

Clause 20 in Part II of the Goods Tariff provides :

“(a) On all goods brought on to a railway station and waiting for despatch without any forwarding note tendered for the same and all goods not removed from a railway station although the same is available for delivery a wharfage charge is made on the Dehri Rohtas Light Railway at the following rate :”

(Then follows a schedule of rates, which is not material.)

The Railway apparently made a claim of demurrage for detention of wagons for 202 days on the footing that the coal was not unloaded from the wagons until it was sold by public auction. It was, however, the duty of the Railway to minimise the loss by

- A** unloading the coal after expiry of a reasonable period after arrival of the consignment and to take early steps to sell the coal. The Company had given intimation that it will not take delivery of the goods and therefore it was the duty of the Railway to sell the goods by public auction without delay. The value of the coal was not more than Rs. 500 and the freight payable was approximately Rs. 500. When sold in the month of June 1955 the coal fetched Rs. 1050. In failing to take any action for a period of more than six months, in our judgment, the Railway did not act reasonably. We are of the view that the Railway, having regard to all the circumstances, is entitled to demurrage for detention of the wagons for one month only. On that footing the Railway is entitled to Rs. 2700 as demurrage and Rs. 495/14 which is payable by the Company as freight less Rs. 1050 realized by sale of coal. The Railway is accordingly entitled to a decree for Rs. 2,145/14.

D We accordingly modify the decree passed by the High Court and decree the claim of the Railway for Rs. 2,145/14 with proportionate costs throughout. The Railway will pay the costs of the Company proportionate to the amount for which its claim has been dismissed in all the three Courts. The order passed by the Trial Court in favour of the Colliery directing the Railway to pay the costs is maintained. There will be one hearing fee in this Court.

E There will be no order as to costs of the Colliery in this Court.

R.K.P.S.

Decree modified.