* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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+ **FAO 340/2010**

NIWAS SURENDER KUMAR & CO .....Appellants

Through: Mr. Kartik Shankar, Ms. R. Priya, and Ms. Kanchan, Advocates.

versus

UNION OF INDIA & ANR .....Respondents

Through: Mr. Rajesh Gogna, Advocate for UOI with Ms. Hiba B.M., Ms. Rebina Rai, and Ms. Punita, Advocates.

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

1. The present appeal has been filed against the judgment dated 04.05.2010 passed by the Railway Claims Tribunal, Principal Bench, *Delhi* (hereinafter the "Tribunal") in OC No. 42/2006. *Vide* the impugned judgment, the claim application filed by the appellant against the Railways seeking compensation of Rs.22,18,906/- on account of short-delivery and damage to its consignment was dismissed.

2. Briefly stated, the appellant company booked a consignment comprising 832 bags of turmeric and black pepper, valued at approximately Rs.24 Lakhs, for transportation from *Erode* to *Delhi-Kishanganj* under

Railway Receipt No. C-083222 dated 21.10.2005. During transit, the train carrying the appellant's consignment met with an accident on 28.10.2005. The train was brought to a halt at about 8:30 a.m. between AXR and BTTR railway stations after its driver noticed fallen trees on the track and water overflowing over it. Following heavy rainfall on 27/28.10.2005, irrigation tanks situated in the vicinity of the railway track were filled to capacity and eventually breached, causing a large volume of water to flow through bridge nos. 444 and 445. Unable to withstand the impact, the railway track was displaced by approximately 10 metres, resulting in the capsizing of a few wagons, including Wagon No. WCR-BCNA-HS-12634 carrying the appellant's consignment. The concerned goods were thereafter transshipped to Wagon No. NRBCN-90841 and ultimately reached *Delhi-Kishanganj* on 19.11.2005 in a short-delivered, damaged, and deteriorated condition. The said damage and short-delivery were brought to the notice of the Railway Authorities before the goods were removed from the railway premises. Thereafter, senior officials of the Railway Administration were deputed to assess the loss on 23.11.2005. Upon such assessment, it was recorded that, out of the 832 bags originally booked, only 410 bags were delivered in a damaged condition, while the remaining 422 bags were completely short-delivered. Consequently, an Assessment Report as well as a Shortage Certificate came to be issued by the Railways. A summary of the information contained in the same is produced hereunder: -

Details of the Goods Dispatched	**Details of the Goods Delivered in Damaged Condition**	**Details of the Goods Short-Delivered**
143 Bags of Turmeric (90	31 Bags of Turmeric (90	72 Bags of Turmeric (90

Kgs each)	Kgs each) – 78% Loss 30 Bags of Turmeric (90 Kgs each) – 70% Loss 10 Bags of Turmeric (90 Kgs each) – 60% Loss	Kgs each)
160 Bags of Turmeric (80 Kgs each)	44 Bags of Turmeric (80 Kgs each) – 90% Loss 20 Bags of Turmeric (80 Kgs each) – 78% Loss 12 Bags of Turmeric (80 Kgs each) – 70% Loss 4 Bags of Turmeric (80 Kgs each) – 60% Loss	80 Bags of Turmeric (80 Kgs each)
390 Bags of Turmeric (50 Kgs each)	148 Bags of Turmeric (50 Kgs each) – 78% Loss 81 Bags of Turmeric (50 Kgs each) – 70% Loss 30 Bags of Turmeric (50 Kgs each) – 60% Loss	131 Bags of Turmeric (50 Kgs each)
102 Bags of Black Pepper (70 Kgs each)	Nil	102 Bags of Black Pepper (70 Kgs each)
37 Bags of Black Pepper (75 Kgs each)	Nil	37 Bags of Black Pepper (75 Kgs each)
Total: 832 Bags	**Total: 410 Bags**	**Total: 422 Bags**

3. The appellant served an amended notice under Section 106 of the Railways Act, 1989 (hereinafter the "Act") upon the respondents on 25.11.2005, quantifying its claim at Rs.22,18,906/- by taking the value of turmeric at Rs.38 per Kg and that of black pepper at Rs.75 per Kg. It was specifically alleged therein that the bags had been badly affected by water, the contents thereof had become discoloured and had consequently devalued in quality and market value, and that the same had occurred due to

the negligence of the Railways in failing to exercise reasonable care and foresight in the carriage of the goods entrusted to it. The appellant claimed that the consignment had been tendered for carriage in a perfectly sound condition and booked at "Railway Risk". The respondents, however, repudiated the appellant's claim. Aggrieved thereby, the appellant instituted the underlying claim petition before the Tribunal seeking compensation of Rs.22,18,906/- alongwith costs and interest @ 18% per annum from the date of the notice till its realisation.

4. The respondents contested the claim by filing a written statement. They summarily raised objections regarding the consignment having been booked on a "said to contain" basis, the prescribed packing requirements not having been complied with, and the wagon having been selected by the consignor, with the consignment having been loaded directly from the truck into the wagon without the supervision of the Railways' staff, and consequently claimed the protection of Sections 93(f), 98, and 65 of the Act. The principal defence, however, was that the loss had occurred on account of an "act of God" within the meaning of Section 93(a) of the Act. It was pleaded that, owing to heavy rains, three irrigation tanks situated in the vicinity of the railway track had breached, causing a heavy flow of water which displaced the railway track and resulted in the capsizing of the wagon carrying the appellant's consignment. Accordingly, it was contended that no liability could be fastened upon the Railways.

5. In the impugned judgment, the Tribunal noted that heavy rains and subsequent floods resulting in the overflowing of tracks are not unusual occurrences in this country, and that the Railways, as an organisation over 150 years old, is expected to possess the requisite expertise to handle such

eventualities. It further noted that the flooding of the track was not directly attributable to the incessant rains, but to the breach of three irrigation tanks situated in the vicinity of the railway track. However, the Tribunal absolved the Railways of all liability on the ground that the responsibility for the upkeep and maintenance of the said tanks vested with the Irrigation Department of the *Andhra Pradesh* Government, which had failed to provide an advance warning to the concerned Railway Authorities regarding the possibility of the said tanks getting breached due to heavy rains. Consequently, the Tribunal dismissed the claim application, while granting the appellant liberty to approach the competent Civil Court to seek redressal against the Irrigation Department concerned.

6. Learned counsel for the appellant contends that as the Tribunal had itself found that the accident was not directly attributable to incessant rains but connected to a breach of the irrigation tanks in the vicinity of the railway track, the respondents could not be absolved of liability under Section 93(a) of the Act. He submits that the respondents failed to establish that the accident was occasioned by an "act of God" or that the loss occurred despite the exercise of reasonable foresight and care. It is argued that the Railways' own enquiry report discloses that the area concerned had been receiving continuous rainfall for nearly 2 days prior to the accident, yet no material has been placed on record to demonstrate that any inspection of the vulnerable stretch, including the nearby irrigation tanks, was undertaken before permitting the train to pass through the said portion. Learned counsel further submits that the respondents also failed to produce any material showing that they maintained appropriate coordination with the Irrigation Department regarding the condition of the tanks situated in the

vicinity of the railway track, despite being fully aware of their existence and their potential impact upon the safety of railway operations during prolonged rainfall. It is further submitted that the respondents also failed to explain the precautions taken to preserve and protect the appellant's consignment after the accident in question.

7. *Per contra*, learned counsel appearing for the respondents supports the impugned judgment and submits that the loss of goods during transit occurred entirely on account of incessant rains and flash floods due to the breach of the concerned water tanks, which constitute an "act of God" under Section 93(a) of the Act. Learned counsel further submits that no negligence is attributable to the Railways, as the responsibility for the upkeep and maintenance of the tanks vested entirely with the Irrigation Department of the *Andhra Pradesh* Government, which failed to provide any advance warning.

8. I have heard the learned counsel for the parties and perused the material placed on record. The controversy in the present appeal primarily revolves around the scope of the statutory defence available to the Railways under Section 93(a) of the Act.

9. As noted above, the Tribunal has recorded a specific finding that the flooding of the railway track was not directly attributable to the rainfall alone but was connected to the breach of three irrigation tanks situated in the vicinity of the railway track. Having returned such a finding, the Tribunal proceeded to dismiss the subject claim application on the sole ground that the responsibility to maintain the said tanks vested with the Irrigation Department of the *Andhra Pradesh* Government; granting the appellant liberty to pursue a separate civil remedy against the said

department. The question that fell for consideration before the Tribunal was not whether the Irrigation Department could also be held to be liable in separate proceedings, but whether the Railway Administration had succeeded in establishing the defence available to it under Section 93 of the Act.

10. The Tribunal has absolved Railways of any liability by wrongly applying Section 93 of the Act as though a statutory immunity is granted to the Railways against claims pertaining to loss or destruction of goods under the said provision. Rather, quite to the contrary, according to this Court, the way Section 93 is couched, it begins with an obligation that Railways, as a carrier, is under an obligation to compensate for any destruction of goods subject to very limited exceptions carved out. The *proviso* further narrows down the play of exceptions by qualifying the same by rule of "reasonable foresight" and duty of "care". The *proviso* puts it beyond any shadow of doubt that exception might be available to the Railways however, subject to demonstrable discharge of duty of care and reasonable foresight, in the first place, ensuring that all risks reasonably foreseeable have been removed. This construct of Section 93, in a sense, fastens statutory strict liability on Railways with obvious exceptions pertaining to events that are not foreseeable.

11. The test of reasonable foreseeability has to be seen from the perspective of an expert in the trade, who is expected to anticipate the risks attached, beyond the abilities of a layman. Railways, with its long and deep experience in operating a vast network under diverse geological and climate conditions is expected to foresee risks emanating from such conditions. It is incumbent upon Railways to foresee beyond what lies below the surface to

pre-empt loss to property in the carriage of goods.

12. Exceptions in Section 93 cannot be a device available to the Railways to lightly dilute the strict liability cast in the main body of the Section.

13. A gainful reference in this regard may be made to the decision of the Division Bench of the High Court of Madras in *K.R. Rajamanickam Chettiar Vs. Union of India*[1], wherein, while considering the scope of the defence of an "act of God" under Section 73 of the Railways Act, 1890, which is *pari materia* to Section 93 of the Act, the High Court held as under:-

> *"…The effect of the amendment made to Ss. 73 and 74 of the Indian Railways Act by Central Act No. 39 of 1961, which had come into force by the time the consignment in question was booked has been considered by one of us in A.R. Ahmed & Co. v. Union of India [A.I.R. 1972 Mad. 454. 85 L.W. 413], and this court with reference to that amended section pointed out. "The point to be noticed is that S. 73 has changed the character of the liability of the railways from that of a bailee into that of an insurer. Therefore, a combined reading of the principal provision along with the proviso makes it clear that once the goods are carried by the railways, the administration cannot escape liability for loss, destruction, damage, deterioration or non-delivery of the goods, unless it is established that the railway administration has used reasonable foresight and care in the carriage of the animals or goods in question. Even if the loss, destruction, damage, deterioration or non-delivery results from any one of the causes enumerated therein, still the railway administration will be liable to the owner of the goods unless it proves that it has used reasonable foresight and care in the carriage of the animals or goods. In other words, so long as there is a failure to use reasonable care and foresight on the part of the railways the railways cannot escape their liability by pointing out that such loss, destruction, damage deterioration or non delivery was the result of the causes enumerated in the section". We are of the opinion that the above extract correctly sets out the legal position with reference to S. 73 as amended by Central Act 39 of 1961. Consequently, even if the damage was found to be the result of one of the causes enumerated in S. 73, still the respondent cannot escape liability unless it proves that it has used reasonable foresight and care in the carriage of the goods."*

[1] 1973 SCC OnLine Mad 148

14. Similar principles have been consistently recognized while considering the expression "act of God" in other jurisdictions as well. In the landmark English decision of *Nugent Vs. Smith*[2], the expression "act of God" has been defined as "*such a direct, and violent, and sudden, and irresistible act of Nature as could not by any amount of ability have been foreseen, or if foreseen, could not by any amount of human care and skill have been resisted.*" Similarly, in *The Queen Vs. The Commissioners of Sewers for Essex*[3], it was observed that the expression "act of God" is confined to events which could neither reasonably have been foreseen nor guarded against.

15. A reference may also be made to the landmark decision of the Supreme Court of the United States in *Gleeson Vs. Virginia Midland Railroad Co.*[4]. In the said case, a landslide triggered by rainfall led to a train accident, which resulted in deaths and serious injuries to the passengers, whereafter the railway company sought exemption from liability on the ground that the incident was an "act of God". The United States Supreme Court observed that once the occurrence of the accident is established, the burden rests upon the carrier to demonstrate that its whole duty had been performed and that the injury was unavoidable by human foresight.

16. It clearly follows that the mere occurrence of heavy rains or flooding would not, by itself, absolve the respondents of liability. Even where the respondents seek to invoke an excepted cause under Section 93 of the Act, it remains necessary for them to establish that reasonable foresight and care

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[2] (1876) L.R. 1 C.P.D. 423. 434, 444.
[3] (1885) L.B. 14 Q.B.D. 561, 574.
[4] 140 U.S. 435 (1891)

were exercised, and the resultant loss was unavoidable despite such precautions.

17. The Railways' own accident enquiry report (Ex. R1) notes that the area in and around BTTR Railway Station had been experiencing incessant rainfall since 26.10.2005, whereas the accident occurred two days thereafter, i.e. on the morning of 28.10.2005. The said report notes that the concerned area had received about 20 cm of rain in the 48 hours leading up to the morning of the accident. It further notes that, due to the rain, the three irrigation tanks on the Up Stream of the Down Line of the track between AXR and BTTR Railway Stations breached, resulting in a heavy rush of water towards the track between KM-206/10-22 on the Down Line and KM-206/9-23 on the Up Line, as a result of which extensive damage occurred to the railway track and the bridges, causing 3 wagons, including the one carrying the appellant's consignment, to capsize.

18. There can be no dispute as to the fact that the existence and location of the 3 irrigation tanks situated in the vicinity of the railway track were well within the knowledge of the Railways, as trains routinely operated through the said stretch. The prevailing weather conditions, too, were neither sudden nor unforeseen. The Railway Administration was fully aware that heavy rainfall had persisted for nearly 2 days before the accident in question. In such circumstances, faced with continuous rainfall over successive days and operating trains through a stretch containing multiple irrigation tanks in the vicinity of the railway track, the Railway Administration is expected to, at the very least, maintain enhanced vigilance over the said area. Such vigilance would necessarily include appropriate inspection of the concerned area by railway personnel, close monitoring of

the condition of the track and bridges, and coordination with the department responsible for maintaining the concerned irrigation tanks. No material whatsoever has been placed on record by the respondents to demonstrate that any such measures were undertaken by the Railway Administration.

19. On the contrary, the report reveals a reactive response, insomuch as the driver of the train encountered fallen trees on the track in real time and observed overflowing water, whereupon he halted the train before local information regarding the breach of the tanks began to emerge, rather than the exercise of reasonable care in the face of a clearly foreseeable risk.

20. No material has been produced to show that any enhanced inspection of the vulnerable stretch was carried out despite continuous rainfall over the preceding days or that any communication was established with the Irrigation Department to check the condition of the nearby tanks before permitting the movement of trains through the concerned stretch.

21. Equally, while the Railways' enquiry report deals at length with the measures undertaken by the Railway Administration after the accident in question to restore the functioning of the affected railway lines, it is completely silent on the measures adopted by the Administration after the accident for the preservation, protection, and proper handling of the appellant's consignment.

22. At the risk of repetition, the Tribunal itself observed that heavy rains and flooding are not uncommon occurrences in this country and that the Railways, being an organisation with more than 150 years of operational experience, is expected to possess the requisite expertise to deal with such eventualities. Having recorded these findings, the Tribunal could not have simultaneously concluded that the respondents stood absolved of liability

merely because the Irrigation Department had failed to issue an advance warning regarding the breach of the tanks. On the contrary, the very expertise which the Tribunal attributed to the Railway Administration demanded that it anticipate the risks ordinarily associated with prolonged rainfall, especially in vulnerable stretches containing multiple water tanks near the railway track, and take appropriate preventive measures before permitting trains to pass through.

23. The Tribunal proceeded on the premise that, since the Irrigation Department was responsible for maintaining the tanks, the respondents automatically stood absolved of liability. Such an approach overlooks the true scope of Section 93 of the Act. Even if the Irrigation Department was negligent in maintaining the tanks or in failing to communicate the possibility of their breach, such negligence cannot extinguish the independent statutory liability of the Railways unless it is established that reasonable foresight and care were exercised. That burden has not been discharged in the present case.

24. It was a statutory duty of the Railways cast under Section 93 of the Act to anticipate the risk from the overflowing water tanks, due to heavy rainfall, close to the tracks. The Railway Administration is expected to foresee all risks to the tracks due to rain, especially in a region with heavy rainfall. The foreseeability is not confined to apparent and superficial risks visible on the surface that could be anticipated even by a layman, but the hidden risks that only an expert can foresee lying below the surface.

25. It's about time that a national mass transporter like Railways is held accountable to high professional standards expected of an organisation of such large size and mass impact.

26. Considering all the aforesaid, this Court is of the considered opinion that neither has it been established that the damage to the consignment in question was occasioned by an inevitable natural calamity that no amount of foresight could have guarded against, which would fall within the ambit of an "act of God" as contemplated under Section 93(a) of the Act, nor has the Railways succeeded in proving the exercise of reasonable foresight and care. This Court is, therefore, unable to sustain the findings returned by the Tribunal on these points.

27. Before proceeding any further, it is apposite to note that, apart from the respondents' plea regarding "act of God" as under Section 93(a) of the Act, the Tribunal had also framed issues regarding: (i) whether the claim application had been signed, verified, and filed by a duly authorised person on behalf of the applicant; (ii) whether the consignment had been booked on a "said to contain" basis and whether proper packing conditions had been complied with by the applicant, and, if not, what had been the effect thereof; (iii) whether the respondents were entitled to the protection of Sections 98 and 65 of the Act; and (iv) the amount of compensation, if any, to which the applicant was entitled.

28. The Tribunal decided the issue relating to the proper institution of the claim application in favour of the applicant/appellant, and the said finding has not been assailed by the respondents. However, the remaining issues were left undecided, as the Tribunal confined its consideration to the plea of "act of God" and disposed of the claim on that basis alone.

29. Considering that the present *lis* has remained pending since 2006, this Court deems it appropriate to proceed to determine the remaining issues instead of remanding the matter to the Tribunal.

30. Insofar as the issue relating to the alleged booking of the consignment on a "said to contain" basis and the alleged non-compliance with the prescribed packing conditions is concerned, the evidence led by the parties may first be noted. On behalf of the appellant, its sole proprietor, *Sh. Surender Kumar*, was examined as AW-1. He exhibited, *inter alia*, a photocopy of the concerned Railway Receipt as Ex. AW-1/1 and categorically deposed in his evidence by way of affidavit that the consignment had been entrusted to the Railway Administration in a perfectly sound condition for carriage. During his cross-examination, he stated that he was present at the originating station at the time of loading of the consignment, though he had not himself booked the consignment. He specifically denied the suggestion that the Railway Receipt had been prepared on a "said to contain" basis. He, however, admitted that the Railway Receipt contained a remark to the effect that dunnage had not been provided and that an 18-inch space had not been left in the wagon.

31. On behalf of the respondents, *Sh. Jasbir Singh*, CMI, R.C.T., *Delhi*, Northern Railway, was examined as RW-1. He exhibited the copy of the Railways' accident enquiry report as Ex. R-1 and stated that he had no personal knowledge of the contents thereof. RW-1 was not cross-examined, and no other witness was examined on behalf of the respondents.

32. No official connected with the booking, loading, or acceptance of the consignment was examined by the respondents. Except for the bald averments made in the written statement and the endorsement appearing on the Railway Receipt, no material has come on record to explain the nature of the said packing requirements, whether the same were mandatory in the facts of the present case, or how the alleged non-compliance therewith

contributed to the damage to the consignment. As already noted hereinabove, the material on record establishes that the damage to the appellant's consignment occurred when the wagon carrying the same capsized after the railway track suffered extensive damage owing to the breach of the irrigation tanks. No material has been placed on record by the respondents to establish any causal link between the alleged deficiencies in packing and the damage to the appellant's consignment. In the absence of any such evidence, this Court is unable to hold that the respondents have discharged the burden of establishing that the alleged booking of the consignment on a "said to contain" basis or the alleged non-compliance with the packing requirements absolves the Railway Administration of its statutory liability.

33. The respondents have also claimed the protection of Sections 65 and 98 of the Act. However, apart from summarily taking the said pleas in the written statement, no evidence has been led to substantiate the same and establish how the said provisions stand attracted to the facts of the present case. No witness has deposed as to the manner in which the requirements of the said provisions stood satisfied in the facts of the present case. In these circumstances, the respondents cannot be held to have discharged the burden of establishing that they are entitled to the protection of the aforesaid provisions.

34. This brings us to the question of the compensation payable to the appellant. AW-1 deposed that the rates quoted by him for the turmeric and black pepper in his affidavit, on the basis whereof the claim amount had been computed, did not include any profit margin. Other than a mere denial of the value of the consignment by the respondents in the written statement,

the said testimony remains unshaken. Significantly, the respondents have not led any evidence whatsoever disputing the valuation of the consignment.

35. In the absence of any evidence to the contrary and considering the totality of circumstances, this Court finds no reason to disbelieve the valuation put forth by the appellant.

36. In view of the aforesaid discussion, the impugned judgment is set aside and the respondents are directed to pay the claimed compensation amount of Rs.22,18,906/- to the appellant along with simple interest at the rate of 12% per annum from the date of the amended notice under Section 106 of the Act, i.e. 25.11.2005, till its realisation. The said amount shall be released to the appellant within a period of four weeks from today.

37. The present appeal is disposed of in the above terms.

(MANOJ KUMAR OHRI)
JUDGE

JULY 17, 2026
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