

(1925) 07 PAT CK 0017

In the Patna High Court

Agent of the Bengal Nagpur Railway Co. Ltd.

APPELLANT

Vs

Hamir Mull Chagan Mull and Another

RESPONDENT

Date of Decision : 01-07-1925

Acts Referred:

Railways Act, 1890 — Section 77

Citation : AIR 1925 Patna 727

Hon'ble Judges : Mullick, Acting C.J.;Kulwant Sahay, J

Bench : Full Bench

Judgement

Mullick, Ag. C.J.

1. The plaintiffs consigned 25 bales of cloth to themselves by the Bengal Nagpur Railway Company to be carried from Assansol to Barabhum. The goods were entrusted to the Railway on the 25th August, 1918. On the 10th September, 1918 only 24 bales were delivered and one bale was missing. On the 21st August, 1921 the plaintiffs brought a suit before the Subordinate Judge of Manbhum claiming compensation for non-delivery. The Subordinate Judge dismissed the suit.

2. An appeal was taken by the plaintiffs to the Court of the District Judge and he on the 2nd January, 1923 reversed the decision of the Subordinate Judge and gave the plaintiffs a decree for Rs. 950 as compensation with costs.

3. The present second appeal is preferred by the Agent of the Bengal Nagpur Railway Company.

4. A preliminary point which was not taken in the memorandum of appeal to this Court has first to be noticed.

5. It appears that in the court of the Subordinate Judge the plaintiffs correctly impleaded the Railway Company as the defendant but in the court of the District Judge the respondent named was the Agent of the Bengal Nagpur Railway. This was clearly an error, for laying regard to the fact that it was the Company that

was sued in the trial court there can be no doubt that in the District Judge's Court the plaintiffs intended to implead the same party and that they misdescribed him as the Agent of the Railway. The present appeal is preferred by the Agent and in any view of the matter he cannot now be heard to say that the appeal cannot proceed merely because he was impleaded in his personal capacity in the lower appellate court.

6. The next two points are more substantial. The first of these is whether Article 31 of the Indian Limitation Act or Article 115 governs the suit. The learned District Judge relying on the case of *Radha Shyam Basak v. The Secretary of State for India* (1916) 44 Cal. 16 held that where the consignee is the plaintiff Article 31 applies but if the consignor is the plaintiff then Article 115 operates. Upon the authorities this view cannot be supported. The following decisions shew that whether the suit is laid in tort or contract, if compensation is claimed for nondelivery of goods entrusted to a carrier the period of limitation is one year as prescribed by Article 31 and that the residuary Article has no application:--*The Indian General Navigation and Railway Company Ltd. v. Nanda Lal Banik* 13 C.W.N. 851; *Jaldu Venkatasubba Rao v. The Asiatic Steam Navigation Company of Calcutta* (1915) 39 Mad. 1; *Mutsadni Lal v. Bombay Baroda and Central India Railway Company* (1920) 42 All. 390 ; *Vally Mohamad Haji Gunny Vs. Nederland S. Navigation Co. and Another*, ; *Gobind Ram Marwari v. The East Indian Railway Company* (1923) S.A.985 of 1921. *The East Indian Railway Company Ltd. v. Sagar Mull* AIR 1925 Pat. 611. Here the claim is for compensation for breach of contract on account of non-delivery and should have been made within one year from the date When the goods ought to have been delivered. The suit has, therefore, been brought long after the due date.

7. The other point is whether a notice u/s 77 of the Indian Railways Act was necessary in this case. It is found as a fact by the learned District Judge that no notice was served but the learned Judge holds that as the suit is brought for non-delivery and not for loss, Section 77 of the Indian Railways Act has no application. For this view he relies upon the case of *the East Indian Railway Company v. Messrs, Kali Charan Ram Prasad* AIR 1922 Pat. 106. That judgment, however, has been dissented from in later cases in this Court and also in the Calcutta High Court, see *Great Indian Peninsula Railway Company v. Jitan Ram* AIR 1923 Pat. 285; *East Indian Railway Company Ltd. v. Netram Ganesh Lal* AIR 1924 Pat. 812; *The Assam Bengal Railway Company Ltd. v. Radhica Mohan Nath* AIR 1923 Cal. 397; *East Indian Railway Company v. Sheo Prasad and Ram Prasad* (1924) CR 118 of 1924. These authorities shew that non-delivery constitutes loss Within the meaning of Section 77 and therefore, the service of notice under the provisions of that section is essential.

8. On both these grounds, therefore, the plaintiffs must fail. The appeal is accordingly decreed with costs throughout and the suit is dismissed.

Kulwant Sahay, J.

9. I agree.