
(1986) 10 BOM CK 0003
In the Bombay High Court
Case No : F.A. No. 330 of 1976

Babubhai Cloth Stores

APPELLANT

Vs

Union of India (UOI) and another

RESPONDENT

Date of Decision : 16-10-1986

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80

Citation : (1988) MhLj 434

Hon'ble Judges : Sharad Manohar, J

Bench : Single Bench

Advocate : K.J. Abhyankar with A.K. Abhyankar, for the Appellant; S.G. Mandrekar for respondent No. 1(a) and N.S. Fadia, for the Respondent

Final Decision : Allowed

Judgement

Sharad Manohar, J.—A Very interesting and important question relating to the interpretation and effect of section 77(B) of the Railways Act arises in this appeal. There are other questions arising but although I am setting aside the learned Judge's judgment on those points the incorrectness of that part of the judgment is not very seriously disputed before me even by the learned Counsel for the Railways Mr. Mandrekar. He has very forcefully argued the question relating to the interpretation of Section 77(B) of the Railways Act and I will deal with the same.

2. The few relevant facts relating to the litigation are the following :

The plaintiff firm is the appellant before me and carries on business of sale of cloth including terrycot goods at Nasik. On 3-2-1973 one person posing as Ganeshchandra Das personally placed an order with the plaintiff firm for consignment of terrycot goods of the value of Rs. 16.000/- . A sum of Rs. 501/- was paid by the said person to the plaintiff firm and a receipt was executed by the plaintiff firm in favour of the said person. There is no dispute that the amount received by the firm was entered in the plaintiffs books of account and

on the same day. i.e. 3-2-1973 the plaintiff firm entrusted the goods with the Central Railway to be despatched to Pathardi. The goods were sent by passenger train. There is no dispute that a railway receipt was taken by the plaintiff from the railway for the sum of Rs- 15,500/- and the railway receipt was sent by the plaintiff to the Central Bank of India. Pathardi- There is no dispute that the railway was to deliver the goods to the person presenting railway receipt at the Pathardi Railway Station.

The railway receipt was not honoured by anybody and after waiting for some time the Central Bank returned the railway receipt to the plaintiff firm with the endorsement that the same had not been presented to the Bank. The plaintiff, therefore, entered into correspondence with the railway enquiring as to what happened to the goods, it is the plaintiffs grievance that in spite of several letters no response whatsoever was received by the plaintiff from the railway and hence, ultimately, on 10-5-1973 a notice purporting to be u/s 80 of the CPC and u/s 78-B of the Railways Act was given by the plaintiff firm to the defendant. The notice was addressed to the General Manager of the Central Railway. But there is no dispute (that the contents of the letter leave no room for the doubt about the claim being made by the plaintiff against the Government of India. As is the usual practice of this railway and of the other government organisations, the railway did not find it necessary to do anything pursuant to this notice. Parkinson, in his inimitable style, has stated that there is very good receptacle for such document. It is called waste paper basket: Probably, that was the place where the notice found its place in the office of the General Manager in the first instance. As is the usual experience, the rationale of the statutory provisions mandating the giving of notice has not a title of basis in the experience. I have asked this question repeatedly to the scores of Advocates, to receive only one reply, viz. that never has the Government or similar authority found light and has stumbled upon the wisdom after receipt of such notice. Whatever that may be, the fact remains that the service of this notice drew blank and hence the plaintiff filed the instant suit against the railway on 29-9-1973 for recovery of the amount of Rs. 16,000/- with interest thereon, i.e. to say, for a total sum of Rs. 17,500/- and costs of the suit with future interest

The goods were also insured by the plaintiff with the Insurance Company, defendant No. 2 and hence, the plaintiff also impleaded defendant No. 2 claiming recovery of the loss caused to the plaintiff by way of enforcement of the insurance policy. I may state at this stage itself that the plaintiffs claim against defendant No. 2 has been negatived by the trial Court and that part of the judgment has not been assailed by the learned Advocate for the appellant appearing before me probably because according to the learned Advocate the plaintiff's claim against the railway is unanswerable. Whatever that may be, the fact remains that the claim against defendant No. 2 is not pressed before me and hence, I do not propose to make any reference to the defence of defendant No. 2 at all.

3. So far as defendant No. 1, Railway is concerned, the suit was defended on various planks, most of which are as brittle as sand. In this connection, I may state that even though defendant No. 1 is a mighty person such as the Union of India, the Legal advisers to this defendant have not hesitated in stooping to any low in the matter of taking every kind of false or technical defence. The crux of the matter is that the plaintiff entrusted the goods to the railways at Nasik for being transported to Pathardi for being delivered to the person presenting the railway receipt. The only question is whether the defendant has done that job. It turns out that the defendant has not and still the Leviathan Authority such as the Union of India has been advised by their Legal Advisers to stoop to the level of raising all sorts of trivial and unworthy defences.

The first defence was that the partnership firm was not registered. As to who informed that it was not registered is anybody's guess. There is no dispute that the plea has been rightly negatived by the lower Court and quite rightly. But the point is that it was just an arrow shot in the dark. Then there is the plea that property in the goods had already passed to the consignee Ganeshchandra Das and hence, the plaintiff had no right to file the suit. Once again it is next to impossible to see as to on what basis such a plea was raised. As will be presently pointed out the entire judgment of the learned Judge is full of countless mistakes and the learned Judge has accepted even this plea of the defendants. Fortunately for the defendant it was not pressed, supported or justified by Mr. Mandrekar appearing for the defendant railway and rightly so because there existed no substance in it.

Then it was contended that the notice dated 10-5-1973 given by the plaintiff u/s 80 of the CPC was invalid. Even this contention has been accepted by the lower Court but in view of the peculiar wording of section 80 as also in view of the recent judicial pronouncements on this point with particular reference to the authorities of this very Court on this point, Mr. Mandrekar was fair enough to state that there was no substance whatsoever in the defence raised by the defendant based upon section 80 of the Civil Procedure Code.

4. The last plea is equally technical but some sort of argument can be advanced in support of that plea. The plea was and is that u/s 77-B of the Railways Act, the plaintiff was not entitled to receive any compensation from the railway for the loss caused to it because it had not made the requisite declaration as regards the value of the goods at the time of entrustment of the goods to the railways. Section 77-B provides in this connection that if the value of the goods being despatched by the railway exceeds the value of Rs. 500/- , the consignor has to make a declaration as regards the said value and has to pay extra rates etc. in that behalf if so required by the Railway Tariff. Admittedly, the plaintiff had not made such declaration. It is the plaintiff's case that it never knew that such declaration was required to be made. But the fact remains that it did not make such declaration. Not making of such declaration meant that certain result u/s 77-B of the Railways Act would ensue. That section provides that if such declaration

is not made, the consignor shall not be entitled to recover compensation from the railways on account of loss, destructions, deterioration or damage as regards the goods. The defence, therefore, was that by not giving the delivery of the goods to the consignor all that transpired was that loss was caused to the plaintiff and that he having failed to make the requisite declaration as regards the value of the goods at the time of their consignments, u/s 77-B of the Act, the plaintiffs suit for recovery of compensation in that behalf was not maintainable.

5. On these pleadings, issues were framed. Issue No. 1 was as to whether the plaintiff proved that it was the owner of the suit consignment and as stated above, the learned Judge accepted the defendant's contention in this regard and held that since the plaintiff had received a sum of Rs. 500/- out of the total price of Rs. 16,000/- for the goods, the property in the goods must be deemed to have transferred to and vested in the said so called purchaser Ganeshchandra Das and that, hence the plaintiff had no locus standi to file the suit for compensation for non-delivery of the goods.

The second issue was as to whether the plaintiff proved that the goods were not delivered to the person for whom they were made and on this point, the learned Judge seems to have recorded the finding in favour of the plaintiff.

The third issue was as to whether the goods were lost due to negligence, misconduct and carelessness on the part of the defendant railway. The learned Judge held that the issue did not survive in view of his earlier findings. However, even on this issue he recorded a finding in favour of the plaintiff. The 6th issue was as regards the bar referred to above contained in section 77-B of the Indian Railways Act and finding in that behalf was in favour of the defendant. The 8th issue was as regards the validity of the notice before suit u/s 80 of the CPC and the finding recorded by the learned Judge was that the notice was not valid. In view of these findings the suit has been dismissed by the learned Judge but in the circumstances of the case without any order as to costs.

6. As already stated above, the finding of the learned Judge relating to the plaintiff's property in the goods in question cannot be and has not been supported by Mr. Mandrekar. In fact he himself invited my attention to the provisions of Sale of Goods Act, as per which this argument becomes totally untenable. The property in the goods could not be deemed to have been transferred in favour of said Ganeshchandra Das merely because he had paid Rs. 500/- to the plaintiff as part of the purchase money. In fact it is the defendant's own contention that Ganeshchandra Das was a fictitious person. It is, therefore, difficult to appreciate the logic of the defendant's plea that the plaintiff's property in the goods passed to a fictitious person who, according to the defendants themselves, never existed. Moreover, the railway receipt leaves no room for doubt that, in the first instance, under the railway receipt the consignee is not Ganeshchandra Das but the consignor himself. No doubt, the consignment was to be received by the person presenting the railway receipt but this was so because a railway receipt is after all a negotiable instrument. Anybody who

purchased the railway receipt from the Bank after compliance with the due formalities, could present the railway receipt to the railways and get delivery of the goods: but that very fact would prove that until he presented the railway receipt to the railway and took the delivery of the goods the property in such goods would not pass to such person. The finding recorded by the learned Judge on this point is. therefore, manifestly untenable.

7. The finding on the issue of the question of the validity of notice is equally fickle. In this connection the learned Judge has relied upon a judgment of a learned single Judge of this Court which is produced at Exhibit 71 in the suit but what the learned Judge has lost sight of is that a good deal of water has flown through the rivers Ganges and Jamuna after the said judgment. If at all an authority was necessary for this proposition, it is to be found in Harbansingh Ajitsingh Vs. Union of India and Another, in which Justice Kantawala as he then was has held in the context of the identical facts, that a notice addressed only to the General Manager of the Railway is not invalid. Even in the present case the only objection was that the notice was addressed not to the Railway but to the General Manager and the plea was that the suit was to be filed against the Union of India, even notice u/s 80 must be addressed to the Union of India. This contention which is raised in the present suit was also raised in the suit with which Kantawala, J. was dealing and that contention has been negatived by the learned Judge by holding that the contents of the notice leave no room for doubt that the claim was against the Union of India. It is held that such notice delivered at the place of the General Manager of the Railway concerned is Substantial compliance with the requirements of section 80 of the Code. In fact while arriving at this conclusion he has followed a judgment of this very Court reported in State of Bombay Vs. N.T. Advani, . But what is even more important is the question is really no longer Integra. No doubt the two judgments mentioned above are judgments of single judges. But the principle of the judgments has been approved of by the Supreme Court in the case of State of Andhra Pradesh Vs. Gundugola Venkata Suryanarayana Garu, . This is what the Supreme Court has held in that Case:

The object of the notice u/s 80. CPC is to give the Government or the public servant concerned an opportunity to reconsider its or his legal position and if that course is justified to make amends to settled the claim out of court. The section is imperative and must be strictly construed. Failure to serve a notice complying with the requirements of the statute will entail dismissal of the suit. But the notice must be reasonably construed. Every venial error or defect cannot be permitted to be sufficient to defeat a just claim. If on a reasonable reading but not so as to make, undue assumptions, the plaintiff is shown to have given the information which the statute requires him to give, any incidental defects or errors may be ignored. In each case in considering whether the imperative provisions of the statute are complied with, the court must see whether the following requirements are present: (I) Whether the name, description and residence of the plaintiff are given so to enable the authorities to identify the

person serving the notice: (2) whether the cause of action and the relief which the plaintiff claims are set out with sufficient particularity: (3) whether the notice in writing has been delivered to or left at the office of the appropriate authority mentioned in the section; (4) whether the suit is instituted after the expiration of two months next after notice has been served, and the plaint contains a statement that such a notice has been so delivered or left.

8. Moreover, as regards this question of interpretation of Section 80 of the Civil Procedure Code. Mr. Mandrekar himself very fairly invited my attention to the very provisions of the Section and pointed out that the Section does not contemplate a notice to be given to the Union of India at all. All that the Section says is that if the suit is to be filed against the Central Government in relation to the acts or omissions of the Railway the notice must be delivered to or must be left at the place of the General Manager of the Railway concerned. The Section does not state that the notice has to be addressed to the Union of India.

Mr. Mandrekar was very much right in positing out this legal position and this Quirt appreciates that submission because the submission was in favour of the plaintiff. In this connection it is to be noted that Union of India is not the same thing as Government of India. The Union of India is the entire State consisting of the three heads: the legislature, the executive and the judiciary. It may be true that the word Union of India, in its narrower sense, may mean the Government of India. But the word Union of India is not implied by section 80 at all. There is therefore, no question of the notice being required to be addressed to the Government of India. Moreover, as observed by the Supreme Court in the passage abstracted above, the rationale of the Section is that a Government should have opportunity to re-examine and reconsider its decision before a suit is filed against the Government and if this objective is achieved by the notice by handing over of the notice to the agent said section, the requirement must be held to be duly complied with. There is, therefore, no substance in the plea that the notice addressed to the General Manager suffered from any shortcoming which invalidated the notice.

9. This leads me to the main question arising for consideration the question about the applicability of section 77-B of the Indian Railways Act. The plea is that according to the plaintiff the goods were lost by the railway by delivery of the same to a wrong person without insistence upon production of the railway receipt and that if compensation was to be received for such loss, it was a mandatory condition precedent that the necessary declaration as regards the value of the goods (since the value exceeded Rs. 500/-) should have been made at the time of entrustment of the goods to the railway for transportation. According to the defendant, the absence of such declaration which is an admitted fact, precludes the plaintiff from recovering any compensation for the loss suffered by them. This contention has been accepted by the Trial Court and Mr. Mandrekar appearing for the railways supported that finding most vigorously.

In this connection, Mr. Mandrekar relied upon three authorities, the first one

reported in AIR 1946 Cal 235. The second one in AIR 1949 285 (P & H.) and the third one in K.V.V. Ardhanari Chettiar and Co., by managing partner K.V.V. Ardhanari Chettiar Vs. The Union of India (UOI) and Another, . For appreciating the argument, it is worthwhile setting out the relevant portion of Section 77-B of the Indian Railways Act. The relevant portion is subsection (1) of the said Section 77-B which runs as follows:

77-B.

(1) Notwithstanding anything contained in the provisions of this chapter, when any articles mentioned in the Second Schedule are contained in any parcel or package delivered to a railway administration to be carried by railway and the value of such articles in the parcel or package exceeds five hundred rupees, the railway administration shall not be responsible for the loss, destruction, damage or deterioration of the parcel or package unless the person sending or delivering the parcel or package to the administration caused its value and contents to be declared in writing or declared them in writing at the time of the delivery of the parcel or package for carriage by railway, and if so required by the administration, paid or engaged to pay in writing a percentage on the value so declared by way of compensation for the increased risk.

No doubt as per this provision, if the value of the goods exceeds Rs. 500/- it would be necessary for the consignor to make declaration of the value of the goods as required by that section or else he cannot claim compensation from the railways for the "loss, destruction, damage or deterioration of the parcel or packages." It is also true that various High Courts have occasion to interpret the word "loss" and the three High Courts - the Calcutta High Court, East Punjab High Court and Madras High Court whose decisions are relied upon by Mr. Mandrekar as mentioned above have held that the loss contemplated by section 75 of the unamended Railways Act, which is to some extent of the same effect as present section 77-B connotes, and includes the loss incurred by the railway company due to delivery of goods to wrong person. But what is to be noted in this connection is that said section 75 of the unamended Railways Act has undergone a drastic change by virtue of amendment which came into effect in the year 1961. In the first place by that amendment the liability of the Railway Administration has been substantially enhanced. Section 73 of the amended Railways Act in fact brings the liability more or less on par with a liability of a common carrier. The said section 73 provides as follows:-

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:

After this portion follow the excepted eventualities such as the act of God and act of State such as wars etc. But even in respect of these exceptions the section makes it abundantly clear that the railway administration shall not be exonerated

from the liability on account of the loss, destruction, damage, deterioration or non-delivery unless the administration further proved that it has used reasonable foresight and care in the carriage of the goods. Section 77-B, relevant portion of which is extracted above, read with the excepted eventualities is an exception grafted on the general rule. From the nature of things therefore, if the exceptions do not hold good in certain cases the main provisions contained in section 73 of the Railways Act must prevail. u/s 73 the railway administration becomes responsible for payment of compensation not only for loss, destruction, damage or deterioration of the goods but it is responsible for compensation even in the case of mere non-delivery of the goods. Section 73, therefore, is a very wide section. One of the exceptions grafted upon it by section 77-B is, on the other hand, narrow in certain respects. The exception says that for recovering compensation on the ground of loss, destruction, damage or deterioration of the goods, the declaration of the value of the same is necessary. The declaration is not necessary if the compensation is claimed on the ground of non-delivery of the goods. Section 73 specifies and enumerates five categories in respect of which compensation is required to be paid by the railways. Section 77-A takes out four categories out of that enumeration but does not take out the last category viz. non-delivery of goods from the enumeration. This means that if the plaintiffs grievance is about non-delivery of the goods, he has every right to file a suit for compensation, even though he has not made declaration as regards the value of the goods as required by said Section 77-B of the Act.

It is thus clear that the amendment to the Indian Railways Act had made substantial advance in the law on the point. This means that the authorities which have interpreted the law on this point before the amendment will not be of much help for allowing at the true meaning and interpretation of present" section 77-B of the Indian Railways Act.

10. This question had come up for consideration before the Gujarat High Court as well as the Madras High Court. I will first deal with the Gujarat High Court decision on this point.

In *Union of India and Another Vs. K. Mansukhram and Sons*, , the plaintiff alleged that one bale of cloth was consigned from Ahmedabad to Buxar but that the railway administration did not deliver the same to the consignee. Compensation was therefore claimed on that account and apart from the various technical pleas which the Advisers to the railway take pride in setting up, the substantial plea that was raised was that the defendants were protected u/s 77-B of the Indian Railways Act. While dealing with this plea, the learned Single Judge of the Gujarat High Court observed as follows :

What has happened to the goods after they were delivered to the Administration is a matter within the special knowledge of the Administration. Though there was a specific issue No. 4 to the effect as to whether the defendants were protected u/s 77-B of the Act or not, the Administration chose not to lead any evidence and wanted to shield their inefficient employees" gross negligence, if not dishonesty,

by taking recourse to section 77-B of the Act. It is a matter of regret nay shame, that the Administration owned by the Union of India does so.

After making this observation, the Gujarat High Court relied on the judgment of the Madras High Court in Union of India and Another Vs. Jetmall Sukanraj, , which will be presently referred to by me and held that the case was one of non-delivery and the noticeable omission of the word "non-delivery" from the area of the contingencies used in section 77-B of the Act connoted with the said section 77-B had no application when the fault on the administration lay in non-delivery of the goods.

Now coming to the Madras decision in Union of India and Another Vs. Jetmall Sukanraj, , this is probably the first case where the difference of the change wrought by the 1961 amendment in the scheme of the Railways Act relating to duties of the railway administration as common carrier has been examined. It is noticed in that case that section 72 of the Railways Act as it stood before the amendment fastened upon the Railway Administration only such responsibility as that of the bailee. However, a basic change with regard to the nature of this responsibility was effected by the Central Act 39 of 1961. In the amended Act Sections 72, 72-A, 73, 74, 74-A, 74-B, 74-C, 74-D, 74-E, 75, 76, 77 and 78 of the principal Act stood repealed and they were replaced by new sections 72 to 78-B. But the most important change that is brought about by this amendment is that the responsibility of the railway as that of an ordinary bailee contemplated by the unamended Act has been transformed into that of a common carrier which, for all practical purposes means that of an Insurer. While examining this responsibility the High Court has noticed the readily perceptible addition of the word "non-delivery". As pointed out above, u/s 72 of the present Act, the railway is liable not only for loss, destruction etc. but also for nondelivery of the goods. Two additional expressions have been added viz. damages and non-delivery. The railway administration is required to insure not only against loss or destruction but also against damages or non-delivery as an insurer in this behalf to certain extent.

Question that arises as to what is the connotation of the word "loss" which continues to be used by section 72 and other cognate sections even after the amendment It can be readily seen that non-delivery is bound to be result of loss or destruction and still non-delivery is mentioned by section 72 and by other cognate sections as something independent from loss which is required to be guarded against the railways. In a sense, every loss is bound to result in non-delivery. Significantly enough, the word "loss" finds place in section 72 as well as in section 78-B but whereas u/s 72 the word "nondelivery" also finds place, that word is noticeably absent in section 78-B. This means that in the case of non-delivery resulting not from some particular kind of loss, the railway will continue to be liable, even where the requisite declaration is not made by the consignor as required by section 77-B of the Act In this connection Madras High Court has referred to Maxwell's Interpretation of Statutes as also Craies Interpretation on

Statute and has held in paragraph 8 of its judgment that each of the above five expressions, "loss", "destruction", "damage", "deterioration" or "non-delivery" will have to be given its appropriate meaning and if there is any overlapping between any two of them that must be reconciled, consistently with common sense and the scheme of the Act. After examining the connotation of various expressions, the Court observed as follows:

Consequently even where a plaintiff comes before a court and claims compensation on the ground of non-delivery, since he is not likely to know that exact cause of non-delivery, it may be open, in appropriate cases, to the railway administration, to put forward a defence on the basis of section 77-B of the Act by proving that since the goods were lost or destroyed, they could not be given delivery of and therefore that section would apply.

Court has observed further that when non-delivery can be correlated to the loss or destruction of goods, it may be open to the railway administration to prove such loss or destruction alone which has resulted in the non-delivery and therefore protection given to the railway administration u/s 77-B of the Act will be available. However, I may mention that the High Court. has specifically left the question open by stating that it was not expressing its final opinion on this aspect in view of the peculiar facts of that particular case. In that case what had happened was that the railway administration had just not proved the loss at all. The administration had not proved that the delivery was made to some other person or that if the delivery was made to some other person, that was the result of some mistake on the part of any of its employee. Hence, the Court held that such a case was not governed by section 77-B at all and hence the railway administration's liability u/s 73 of the Act remained intact The decree passed by the trial Court in favour of the plaintiff consignor was, therefore, not interfered with by the High Court

11. The position in the present case is for all intents and purposes identical. In the instant case the plaintiff came to the Court and stated that delivery might have been given by the railway to a wrong person without a railway receipt What he implied was that there was almost a felony or offence committed by the railway administration's employees which resulted in non-delivery; but it can be readily inferred that from the very nature of things, the plaintiff could not know the reasons of the non-delivery. All that he could know is that the consignment which was made deliverable to self was not delivered by railway administration accordingly. In this connection, one factual position is extremely important. The forwarding note as also the railway receipt made it clear that the consignee was not person other than the consignor himself. The forwarding note mentioned that the consignment was to be delivered to the "self. The railway receipt was no doubt, negotiable and upon the production of the railway receipt by a holder in due course the consignment would be delivered to such person; but the receipt was never presented to the railway administration and when the consignor went to take the delivery, railway administration just downed its shutters stating that

they could not make the delivery. This was his case. As against this, what the railway administration stated in its written statement is of extremely significant character. In paragraph 4 of the written statement it was stated as follows :

It is true that the consignment had reached the destination and was delivered on presentation of the railway receipt. It appears that a fraud has been played in this case. The deliberate, dishonest and intentional perfunctory act of the Station Master at Pathardi is emphatically denied. The case has been handed over to the police for investigation. As the investigation is still going on by the police and no further information is available from them, the answering defendant is unable to give a complete written Statement, at this stage until the police investigation is completed. It is submitted that defendant may be allowed to add and amend the Written Statement, when the defendant will get complete information from the police. The fraud practised by the consignor or the endorsed consignee or their agent cannot also be ruled out in this case and the police is probing in the matter and their investigation is still pending.

Significantly enough, no additional written statement was never filed nor was any amendment of the written statement ever asked for, but what is more curious is that none of the statements in the written statement has been proved by the administration at all. Evidence is led by the railway administration of persons at the Nasik end where the goods were entrusted to the railway. Two witnesses have been examined by the administration to prove the manner in which the consignment was accepted by the railway at Nasik City for being transported to Pathardi. But no one is examined at the Pathardi end to prove as to what happened to the consignment when it was received at Pathardi. The plea that the consignment was handed over to some person who had played fraud upon the railway remains just a statement in the air blurted out in the written statement. No evidence in that behalf is led by the administration at all. In these circumstances it is impossible to hold that the railway administration has proved that the goods in question were "lost" within the contemplation of section 77-B of the Railways Act. If this is the position then this case is one of sheer non-delivery. It is not proved that the non-delivery is the result of loss or destruction or damage or deterioration of the parcel at all. It is a pure case of non-delivery simpliciter. If this is the position, section 77-B of the Railways Act does not come into operation at all. The non-delivery by the railway administration stands proved and hence, u/s 73 of the Railways Act the railway is dearly liable for the price of the goods as compensation to the plaintiff.

12. Mr. Mandrekar appearing for the administration, however, relied upon the plaintiffs evidence and contended that on the plaintiff's own showing that this was a case of "loss" contemplated by section 77-B. He also relied upon certain averments in the plaint in that behalf.

In paragraph 3 of his evidence, the plaintiff has stated as follows :

According to me the goods were lost in transit due to the negligence and

misconduct of the railway servants.

In paragraph 7 of his evidence, he has stated as follows :

It is true that I came to know that the goods were delivered to somebody on forged railway receipt and that police investigation is going on.

In paragraph 7 he has further stated as follows :

According to me the railway authorities were negligent as none of them replied my three registered letters and a reply paid telegram.

In paragraph 10 of his evidence, he has stated as follows :

I came to know at Dhanbag from the statements made by the Divisional Superintendent, Dhanbag that the goods consigned booked by me was delivered to wrong person. But I myself had no personal knowledge about the same.

Relying upon these statements of his evidence, the learned Counsel argued that it was the plaintiff's own case, viz. that the goods were lost in transit. Argument is that if this was the position then section 77-B was a clear bar against any claim on his part for compensation.

I cannot accept this contention. As has been held by various High Courts repeatedly, these are the matters which are entirely within the knowledge of the railway administration. The plaintiff, from the very nature of things, could not have known as to what happened to his goods. Only the officers and employees of the railway administration could know anything about it. But if there was any doubt about it, that is resolved by the evidence given by the plaintiff in paragraph 10 of his deposition which is referred to above. From that it is quite clear that the plaintiff had no personal knowledge about the statement made by himself relating to the loss or relating to misdelivery to wrong person. What he has stated in the Court is what he has heard from the Divisional Superintendent, Dhanbag. It is obviously a hearsay evidence and as such the statements are not even admissible in evidence. It was for the railway administration to examine some responsible officer to prove that the non-delivery is the result of some loss or deterioration. I am assuming that it was their case that the non-delivery was the result of misdelivery and that mis-delivery itself is something in the nature of loss. But it is not enough for the administration to plead that position in the written statement. It is necessary for them to examine somebody to prove that fact. Strangely enough, the administration has examined witnesses to prove the factum of consignment but no one is examined for proving that consignment was lost by the railways by any means whatsoever, either by loss in transit or by misdelivery to wrong person. Under these circumstances, the case falls squarely in the ratio laid down by the Madras High Court as also by the Gujarat High Court in the judgments referred to above.

Having regard to these circumstances, in my opinion, the railway has no defence to the plaintiff's claim. The order passed by the trial Court dismissing the suit

must be therefore set aside. The appeal is allowed. Decree passed by the trial Court is set aside and the plaintiffs suit is decreed with costs throughout.