

(1932) 09 PAT CK 0008
In the Patna High Court

Bengal and North Western Ry. Co. Ltd.	APPELLANT
Vs	
Kameshwar Singh Bahadur	RESPONDENT

Date of Decision : 07-09-1932

Acts Referred:

Railways Act, 1890 — Section 140, 77

Citation : AIR 1933 Patna 45

Hon'ble Judges : Courtney Terrell, C.J.; Fazl Ali, J

Bench : Full Bench

Judgement

Courtney Terrell, C.J.—This suit was originally begun by the plaintiff on 4th October 1923 against the Agent of the B. and N.W. Ry. and also the Agent of the E.I. Ry. for compensation for the loss by the plaintiff as the consignee of goods of which short delivery had been made. The case was heard by the Subordinate Judge and the plaintiff applied to amend his plaint by substituting the respective railway companies as defendants in place of their Agents. The Judge heard the evidence produced by the plaintiff and the defendants but without deciding on the merits dismissed the suit as against both Agents and refused leave to amend the plaint. On appeal by the plaintiff a Bench of this Court dismissed the appeal as regards the Agent of the E.I. Ry., but remanded the case to the Subordinate Judge to allow an amendment of the plaint substituting the name of the B. and N.W. Ry. Company as defendant for that of its Agent and for a decision of the suit on the merits as against that Company. The E.I. Ry. Co. and its Agent were accordingly eliminated from the proceedings. No application was made either by the plaintiff or by the B. and N.W. Ry. Co. to call fresh evidence and after considering the evidence already before him and allowing the amendment directed, the Subordinate Judge gave judgment for the plaintiff against the B. and N.W. Ry. Co. who now appeals from his decision.

2. The facts are simple. James Duke and Company of Calcutta despatched to the plaintiff on 27th August 1922 a consignment of 3229 bundles of round steel rods weighing 851 maunds and also four wooden frames from Ramkristapur Railway

Station on the E.I. Ry. to Muktapur Railway Station on the B. and N.W. Ry. Risk note A was signed by the agent of the consignor, the contract was made with the E.I. Ry. and the E.I. Ry. acknowledged receipts of the goods. On three separate dates in September open wagons arrived at Mokameh Ghat Station on the E.I. Ry. Co.'s line. Each of these contained a portion of the consignment of steel rods. It appears from the evidence called by the E.I. Ry. Co. that in each case the goods were unloaded by the men of the E.I. Ry. Co. from the trucks into the company's godown, and thence were taken over by the men of the B. and N.W. Ry. Co. and loaded into closed trucks on that company's line. An official of the B. and N.W. Ry. Co. in each case signed a register belonging to the E.I. Ry. In this register in the case of each portion of the consignment the station of origin (Ramkristapur) and the station of destination (Muktapur) are stated. The names of the consignor and consignee are indicated.

3. Under the head of "description" the goods are variously stated to be "lot bundles round iron" or (5, 11, 4 as the case may be) bundles of rod. Then is stated "weight as per invoice." Then there is a column which is headed "remarks as to condition, weight on "reweighment, etc." There is no statement as to the weight on reweighment and indeed there is nothing before us to show whether the goods were or were not reweighed by the B.N. & W.R. Co., and the observations in the column merely referred to the condition and packing of the goods. In the column headed "weight as per invoice" the weight of the different lots which were received at Mokameh Ghat on 8th, 19th and 20th September is set forth as totalling 851 maunds as stated in the invoice. It is perfectly clear that the Bengal and N.W.R. Co., had an opportunity to reweigh the goods and they might, if such was the fact have entered in the register of the E. I. R. Co., the statement that the weight of the goods so reweighed did not correspond with the weight in the invoice. They had ample opportunity to prove before the Subordinate Judge (if such had been the case) that notwithstanding that they had acknowledged receipt of 851 maunds from the E.I.R. Co., in fact the amount received by them was something less. In the absence of evidence it cannot be assumed that they took from the E.I.R. Co., anything less than the amount acknowledged by them when signing the register. The register makes no mention of the four wooden frames which were part of the consignment despatched by the consignor to the consignee. The three closed wagons into which the iron is said to have been loaded by the Bengal and N.W.R. Co., were delivered at Muktapur Ry. Station on three different dates. The first delivery was on 14th September 1922, the second on 20th and the third on 21st. On the occasion of the first delivery the clerk in the employ of the plaintiff signed the entry in the register of the B. and N.W.R. Co., and acknowledged the receipt of the entire amount of iron rod mentioned in the invoice, that is to say 851 maunds. The closed trucks were taken to the plaintiff's siding, unloaded, and the iron rod was weighed. This operation took two days and it was found that there was a shortage of 248 maunds. The wooden frames were delivered by road van on 5th October.

4. One, of the defences relied upon by the railway company has been the familiar, and in the circumstances, somewhat disingenuous contention that the plaintiff failed within six months from the date of delivery of the goods to prefer a claim in writing to the railway administration as provided by Section 77, Railways Act, and it is necessary therefore to examine the correspondence which took place. On 23rd October 1922 the plaintiff's manager wrote to the District Traffic Superintendent of the B. and N.W. Ry. at Samastipur submitting a claim for non-delivery and setting forth precise particulars and asking for an early settlement and also enclosed a copy of this letter to the Traffic Manager of the E.I. Ry. Co. at Howrah. On 27th October 1922 the District Traffic Superintendent of the B. and N.W. Ry. wrote acknowledging the receipt of this letter and stating "The matter is receiving my attention." On 30th October the Acting Traffic Manager of the E.I. Ry. Co. acknowledged the receipt of the copy of the letter sent to him and stated that it was receiving his attention.

5. Nothing further seems to have happened until 19th February 1923 when the plaintiff's manager again wrote to the District Traffic Superintendent of the B. and N.W. Ry. again setting forth particulars of the claim and stating that his letter has not been acknowledged and that unless an immediate settlement was reached the matter would be placed in the hands of lawyers. On 3rd April 1923 the District Traffic Superintendent of the B. and N.W. Ry. appears to have paid a personal visit to the plaintiff's mill and made an inspection of the goods which had been delivered. On 14th May the plaintiff's manager again wrote to him referring to the visit and asking if he had anything to communicate in connection with the plaintiff's claim. On 22nd May the District Traffic Superintendent replied that he had forwarded the plaintiff's letter dated 22nd August 1922 to the Traffic Manager at Gorakhpur for favour of disposal. On 23rd July the plaintiff's manager wrote direct to the Agent, B. and N.W. Ry., at Gorakhpur, referring to the claim stating that his several letters addressed to the Traffic Department had received no attention and stating that the matter would have to be handed over to the plaintiff's solicitors. On 4th August 1923 the Traffic Manager of the B. and N.W. Ry. at Gorakhpur wrote to the plaintiff's manager. After referring to the plaintiff's letter of 27th August 1922 he said:

The consignment was delivered to you as received from the E.I. Ry. and I regret I can do nothing in this case.

6. The defendants in support of their contention referred to Section 140, Railways Act, the material parts of which are as follows:

Any notice or other document required or authorized by this Act to be served on a railway administration may be served ... in the case of a railway administered by a railway company on the Agent in India of the railway company.

7. They contend that the letters written by the plaintiff's manager to the District Traffic Superintendent to Samastipur do not comply with Section 77 and that the words "may be served" in Section 140 mean "must be served." It is interesting

to note that no such point is taken in the final letter of 4th August 1923 from the Traffic Manager and no such point was made in answer to the letter of 23rd July from the plaintiff's manager to the Agent of the railway. The company have persisted in a course of business by which they have allowed their District Traffic Superintendent to deal with claims for compensation. The agent has at no time until the written statement in this case repudiated the action of his subordinate. A series of cases of the Calcutta High Court have been cited to us in which opinion has been expressed that the word "may" in Section 140 is to be construed as "must" such, for examples, as *Martin and Co. v. Fakir Chand Sahu* [1910] 7 IC 241 and *Nadir Chand v. Wood* [1907] 35 Cal 194. I am entirely unable to understand the reasoning which prompted these expressions of opinion and I decline to follow them. Section 140, in my opinion, merely provides a safe and unanswerable method for serving a claim upon the railway administration and enacts in effect that service upon the Agent is service upon the company, but Section 77 enacts that the service must be upon the administration and inasmuch as a company must conduct its business through its authorised agents the only question to be decided is whether the District Traffic Superintendent is in fact in the circumstances of the case the duly authorised agent of the railway company. If the company by its course of business holds up any particular official as competent to deal with claims then service of notice upon such an official must be taken as against the company to be service upon the company. I agree with the reasoning of Kumaraswami Sastri, J., in the Full Bench decision of the Madras High Court in *A. Mahadeva Ayyar Vs. The South Indian Railway Co.,* . The learned Judge said:

The question whether a particular officer is authorized by the agent to receive such notices on his behalf is a question of fact to be determined in each case. Agency may be proved either by direct evidence of authority, or by a course of conduct which in the opinion of the Court would justify the inference that the subordinate official was authorized by the agent to receive notices on his behalf.

8. The decision of this Court in *East Indian Railway Company Vs. Bhimraj Srilal*, is a decision upon the facts of the particular case and it was held that no such delegation of authority had in fact been proved. The point that the notice required by Section 77 must u/s 140 be served on the Agent did not directly arise and, in my opinion, the case is no authority for that proposition. Similar observations may be made on the the case of *E.I. Ry. Co. Ltd. v. Sowa Lal Sawan Lal* [1928] 112 IC 616. In my opinion in this case not only is it unnecessary in order to prove service on a railway administration to establish that the notice was served upon the Agent, but there is ample evidence in this case in the course of conduct of the railway company and the behaviour of the Agent in not raising the point in reply to the letter of 23rd July to establish that the District Traffic Superintendent at Samastipur was in fact authorised by the railway administration to receive notice of the claim.

9. The second contention on behalf of the railway company is to my mind as

unattractive as the first. They rely upon Articles 30 and 31, Limitation Act. It is contended that if the matter is to be considered as governed by Article 30 the suit has not been brought within one year of the loss incurred by the plaintiff. It is said that the last delivery of iron was made on 21st September and it was then made clear that the whole of the iron which could be delivered had not been delivered and the suit having been begun on 4th October 1923 a period of more than one year had elapsed. The answer to this contention is simple. The loss or injury referred to in Article 30 is the loss or injury to the goods and not the loss or injury to the consignee. If the defendants wish to take advantage of Article 30 the onus is upon them to prove when the loss or injury to the goods actually occurred and that more than one year has elapsed from the date. In this particular case the defendants have throughout taken up the position that no loss in fact incurred and that the goods were delivered as received by the defendants from the E.I. Ry. Co. The article of the Limitation Act which is applicable to this lease is Article 31, that is to say the claim is for compensation for non-delivery of the goods and the period of limitation is to be counted from the time when the goods ought to have been delivered. The defendants contend that even under Article 31 the date to be considered is that on which the last delivery of the iron rods was in fact made, that is to say 21st September. To this contention there are two answers. Firstly this is a suit u/s 80 of the Act for compensation for loss. Such a suit may be brought either against the company with whom the contract for carriage was directly made or against the railway administration on whose railway the loss occurred. If the latter course be taken it does not follow that the suit is one founded in tort. The suit is founded on statutory liability which is attached to the contract though that contract be made with a railway other than the defendant to the suit.

10. Reference may be had to the contract for carriage for the purpose of determining the date when the goods ought to have been delivered. If no particular date is specified it must be determined as a matter of what is reasonable having regard to the circumstances of the contract, and this criterion must be applied as much in favour of the plaintiff as in favour of the defendant. Now the contract referred not only to the delivery of iron but also to the delivery of the four wooden frames. It was a single contract in respect of a single consignment and the plaintiff might reasonably take the point of view that until the entire contract purported to have been fulfilled he was not in a position to complain of non-delivery of a part of the goods subject to contract. As I have said the wooden frames were delivered by road van on 5th October and the suit was begun on 4th October in the following year and is therefore in time. But there is another aspect of the case which is even more conclusive against the defendant's contention. The plaintiff on 23rd October wrote to the defendants of the loss. He was justified in waiting to bring his suit until the defendants had made it clear that they had no intention of delivering the goods. Had the position been reversed the defendants would not have hesitated to contend that a suit was premature which did not give them a reasonable opportunity of fulfilling the

terms of the contract. The defendants by a deliberate process of ignoring the plaintiff's repeated requests for attention to his claim misled him into delaying his suit and it is not open to them now to contend that the suit has been brought too late. In my opinion the attitude of the railway company has throughout been lacking in candour and their defence to this suit even in its most technical aspects has no merit. I would therefore dismiss this appeal with costs.

Fazl Ali, J.

11. I agree.