
(1961) 12 MP CK 0007
In the Madhya Pradesh High Court
Case No : First Appeal No. 17 of 1957

Central India Chemicals Private Ltd.	Vs	APPELLANT
Union of India (UOI)		RESPONDENT

Date of Decision : 12-12-1961

Acts Referred:

Limitation Act, 1908 — Section 30
Railways Act, 1890 — Section 77, 80

Citation : AIR 1962 MP 301 : (1962) JLJ 811 : (1962) 7 MPLJ 575

Hon'ble Judges : T.C. Shrivastava, J; H.R. Krishnan, J

Bench : Division Bench

Advocate : K.A. Chitale, for the Appellant; V.R. Dhodapkar, for the Respondent

Final Decision : Dismissed

Judgement

Krishnan, J.

This is an appeal by the plaintiff from the judgment and decree dismissing his suit for compensation, in respect of a consignment belonging to him, of a boiler and attached parts, carried by the Railway from Kanpur to Sehere, parts of which on arrival were found to have got broken, and parts missing. The questions for decision at this stage are,

(i) Whether the suit was bad,

(a) for non-compliance with the provisions of Section 77, Railways Act, the claim being preferred in writing more than after six months from the date of delivery of the goods for carriage;

(b) for non-joinder, as party, either of the two railway administrations i.e. Northern Railway administration to which the goods were delivered by the consignor and the Central Railway administration over which the goods had to be carried during the latter part of the transport;

(c) for limitation under Article 30, and the effect, if any, of the defendant's not

having pleaded that the suit had been filed beyond the one year period from the date of the plaintiff's knowledge of the breakage and loss of parts.

(ii) Whether the plaintiff has ostensibly discharged the burden of proof on the negligence or misconduct on the part of the Railway, which he had accepted, by sending his goods at owner's risk?

(iii) Finally, the quantum of damages, if they are otherwise payable.

The facts of the case, except as to the manner in which the consignment was damaged, is common ground. The plaintiff sent his agent to go and buy an old boiler and attached machinery from Kamalapat Motilal Mills at Kanpur. He bought it and got the machinery loaded in a wagon at their railway siding. The consignment was taken by the Northern Railway administration who gave them a bill, as usual, for "self", and which was ultimately endorsed in favour of the plaintiff and sent to him. The weight was about three tons (84 maunds) and after putting the machinery in the wagon, the consignor himself got the different sections (including some wheels) secured by wire ropes. It was on "owner's risk" and the packing was described as in a defective condition,--"Boiler on chams secured by iron wires and strappings." The date of the invoice was 27-10-1954, the wagon being open, No. 61465. It arrived at Sehore on 22-11-1954, now in another wagon No. 75534. It is also in evidence that on 3-11-1954, a servant of the railway had detected that the load on this wagon had got out of balance and could not be taken farther without the danger of the wagon itself overturning and causing an accident. Accordingly, it was pushed back to some siding or yard for readjustment. We do not know what had happened but soon after it was on its way to Sehore, loaded in another wagon. On arrival at Sehore, it was detected that some parts had got damaged, and some parts had disappeared.

The plaintiff had a look at the machinery on the arrival and as there was damage, declined to take it except on open delivery with the damage assessed and noted in the usual manner. Accordingly, the railway took the appropriate steps, and got the damage noted with particulars and assessed by a mechanic from Jhansi and gave open delivery finally on 15-3-1955. Meanwhile the railway administration discovered that the original transport charges "levied on this consignment were on underestimate because of the size of the articles carried, and accordingly demanded and obtained a surcharge, paid under protest. Some time later, the plaintiff issued notices and finally brought the suit for compensation for loss of some parts, and damage to others, the expenses of refitting, and refund of the surcharge of Rs. 343/-. The compensation proper was Rs. 4700/- on the basis of what the plaintiff describes, without direct evidence, as an estimate by Marshalls a well known engineering company; this also included a sum of Rs. 1000/- as refitting, charges. The railway's assessment was about one third of this sum, being Rs. 1600/-.

The learned Civil Judge held that the suit was had for want of timely claim u/s 77, Railways Act, and on some other grounds. He, however, did not think that

the non-joinder of the Northern Railway was a defect, but he held that the plaintiff had not discharged the burden of proof which was on him u/s 74-C, of establishing negligence, misconduct on the part of the railway. He also held that the damage had been brought about by the consignor's own conduct. On limitation, he held that the suit was "time-barred" but he was thinking of the six months" period u/s 77, and not the one "year period under Article 30, Limitation Act.

Ground No. (i) (a):--The claim was preferred to the Central Railway administration in a letter dated 27-5-1955; that is to say, well beyond six months from the date on which the consignment was handed over to the Northern Railway administration on 24-10-1954. However, it is within six months from the date of the actual delivery of the goods to the plaintiff which was 15-3-1955, though, it had arrived at Sehore on 22-11-1954. The position taken by the plaintiff-appellant here is that for one thing, considering the purpose for which Section 77, Railways Act, has been enacted, the six months should be counted from the date of delivery of the consignment to the consignee and not the handing over to the railway administration for transit. For another, more emphatically, in a case like this the compensation is for damage and not for loss, destruction or deterioration; so Section 77 has no application. The two positions call for separate examination.

(i). The first does violence to the express wording of Section 77, that-

"The claim for refund or compensation should be preferred in writing within "six months from the date of the delivery of the goods for carriage by the railway"."

To be sure, there is the judgment of the High Court of Assam in *Amarchand Pannalal v. Union of India*, AIR 1955-Assam 221; but all the other High Courts are of the opposite view, including this High Court, in *Managing Agents (Martin and Co.) Vs. Seth Deokinandan and Another*, . This view being quite consistent with the wording of the section the matter need not be discussed any further.

(ii) The more elaborate argument in this regard is that the present claim is for the most part (i.e., all except the one for refund of the surcharge) the one for compensation for damage to the goods, and not for any of the three eventualities expressly mentioned in that section. Further, it is urged that by analogy with Section 72, which also mentions loss, destruction or deterioration and has been held by Courts not to be exhaustive, this section should also be held so. There are the two other eventualities of delay and damage; Section 74-C speaks of "loss, destruction or deterioration or "damage to such goods" " and again Section 76 speaks of " "delay", loss, destruction, deterioration or ."damage". This question has been touched upon in some of the rulings such as in *Imperial Match Co. (India) Ltd. v. Union of India* AIR 1957 Madh Bha 111, where the claim was for compensation on account of delay, and it was held that since Section 77 of the Railways Act does not speak of delay, a suit for the claim was not barred for want of notice. Again there the view was that Section 77 might not apply if it

is a claim based on tort and not breach of contract.

A similar view was held in *Sundarji Shivji Vs. Secy. of State*, where the misconduct on the part of the railway administration was conversion. In these and some decisions of a similar nature, the courts have distinguished between the Railways' liability in tort, and that in contract. With all respect we feel that the approach should be in accordance with the wording of Section 77, and not on the basis of any classification not envisaged there. These rulings have in any event to be reconsidered in the light of the principles laid down by the Supreme Court in *Governor General in Council Vs. Musaddi Lal*, ; this was an appeal from the judgment of the Allahabad High Court to the effect that Section 77 was not a condition precedent, where the claim was for non-delivery of goods which that High Court held to be one distinct from a claim for compensation for loss, destruction or deterioration. Disagreeing with this view, the Supreme Court held :

"Section 77 is enacted with a view to enable the railway administration to make enquiries and if possible to recover the goods and to deliver them to the consignee, as to prevent stale claims. It imposes a restriction of the enforcement of liability declared by Section 72. The liability declared by Section 72 is for loss, destruction or deterioration. Failure to deliver is the consequence of loss or destruction of goods, it does not furnish a cause of action on which a suit may lie against the railway administration, distinct from a cause of action for loss or destruction. By the use of the expression, "loss, destruction or deterioration", what is contemplated is loss or destruction or deterioration of the goods and the consequent loss to the owner thereof. If because of negligence or inadvertence or even wrongful act on the part of the employees of the railway administration, goods entrusted for carriage are lost, destroyed or deteriorated, the railway administration is guilty of failing to take the degree of care which is prescribed by Section 72 of the Railways Act."

We are, however, called upon in the present case to ignore Section 77, not because this is based on delay or is a claim on tort, but because it is a claim on damage. Ingenious as it is, this view-point is fallacious. Even if the three categories mentioned in Section 77 are not exhaustive of all the occasions in which the owner of the goods may claim compensation from the Railway, still this would not help the plaintiff unless he establishes that "damage" is not included in any of them. Where there is delay, still the basis of the claim may be the consequent loss measurable in terms of money, because of the fall in price, say economic or market deterioration or rotting of the goods, i.e., "physical deterioration". As for "damage", it is only a general name for the monetary loss to the owner, for different reasons, in other words, the genus of which destruction and deterioration are only the species.

There may be a difference of opinion on whether a particular happening such as the disappearance of the parts of contents of a unit of consignment, (say some fruits from a basket, or some seers of sugar from a bag) is "loss" or "deterioration" of the goods; but "loss" properly so called should be of individual

separable unit of consignment; when it is only of a part, it is more properly "deterioration". Destruction is, of course, a change in the nature and utility of the article which is complete; and which is accompanied by the leaving of traces, that are altogether useless: in "loss" there would be no traces at all. "Deteriorate" and "deterioration", is change for the worse, the remains being still useful, "less valuable", and not altogether useless. The Oxford Dictionary defines "deteriorate" and "deterioration" as:

"to make worse, to lower in quality or value; to worsen to become worse; to become impaired in quality or value;

"the process of growing or making worse." Damage includes this and is more general. It is defined (by the Oxford Dictionary) as:

"loss or detriment caused by hurt or injury; a disadvantage; a misfortune;" As a verb it means:

"to hurt, harm, injure; now commonly to injure (a thing) so as to lessen its value;"

Damage, in general, may be the result either of purely natural causes and action of time such, for example, as happens, when a consignment of fruits, rots by bad storage, exposure or mere delay. It may also be the result of any sudden perk or fall, such as we have, when a consignment of glass or China is broken. It may be due to economic causes also. All these are "deterioration", which is one form of damage with ascertainable sub-species. When the damage is complete, then it is usual to call it destruction.

It is fallacious, therefore, to argue that we have deterioration when a basket of fruits rots, and damage when some of the contents of a crate of glassware are broken, and that Section 77 applies to a claim based on the former, and does not apply for a claim based on the latter event. The best way of summarising the argument is to hold that the word "damage" connotes a genus while "deterioration" and "destruction" connote two species. Even delay will be another specie but we are not immediately concerned with examining the correctness of the view that delay, which is. not expressly mentioned in Sections 72 and 77, is one form of damage. The mention of damage separately in some of the sections is only a way of referring to the genus and does not create a separate specie distinct from damage or destruction. The result therefore is that in a case like this a claim for compensation for breakage of certain parts of the boiler, and loss of certain other parts, is one for deterioration, which is a form of damage, and is controlled by Section 77 as the condition precedent. The notice having been issued beyond the prescribed period, the suit does not lie.

Ground No. (i) (b):- Section 80 of the Railways Act (as far as this case is concerned) runs-

"Notwithstanding anything in any agreement purporting, to limit the liability of a railway administration with respect to traffic while on the railway of another

administration, a suit for compensation for loss. . . . destruction or deteriorationof goods booked through over the railways of two or more railway administrations, may be brought either against the railway administrationto which the goods were delivered by the consignor thereof, as the case may be, or against the railway administration on whose railway the loss, injury, destruction or deterioration occurred".

Impleading the railway administration or administrations is in principle something different from impleading the Union of India as the juristic person responsible for the satisfaction of the decree, if any, passed against the administration or a state owned railway. When a company owns the railway the railway administration might itself be the juristic person concerned; but at present this is a rare happening in our country. The point to note is that u/s 80, it is not sufficient merely to implead the Union of India; it is necessary to implead one or more of the railway administrations named and described as such, though most often now-a-days they are no more than departments of the Union Government, This is based on the sound principle that the plaint should show on its very face which department or zone of the State railways is being held responsible, so that the Union of India may be in a position to investigate, collect the materials, and give a proper answer. It is, therefore, no answer to state that the Union of India having been impleaded the nonjoinder of one or more railway administrations is immaterial; it is a statutory requirement based on sound principles. It may be that in the present circumstances, the first clause of this section called for adaptation in 1950; but we have to apply the statute as it stands; as far as we were concerned here, that clause is not of any effect.

This section goes on to give a choice to the plaintiffs, which of the railway administrations to sue and which to leave out. If the entire transit is over the railway of one administration, the position is very simple; that administration alone is sued in the form--"The Union of India, through the Railway administration . . such ... and.. such" The choice really comes in when one railway administration receives the goods and sends it on over its railway, as well as that of one or more of other administrations, till it reaches the consignee. The plaintiff may decide for himself, whether he is able to spot the particular railway administrations over whose railway his goods were passing, when they suffered the loss, destruction or deterioration. If he is sure of it, he need implead that administration only. If he is not, he should implead the administration which received the goods from the consignor. For obvious reasons, it would be most often prudent to sue the initial receiving administration whether or not the other administrations are also sued. The choice given by Section 80, is not between suing one or more railway administrations, and not suing any of them at all; it is between suing this or that out of two or more administrations involved. Not only is the section worded clearly, but also is the position in this regard cleared by authority for example, in *Dominion of India v. Firm Museram Kishunprasad* AIR 1950 Nag 85 (judgment of 28-9-1947).

"Merely suing the Governor General as representing the entire State owned railways (at least before the Indian Independence Act was passed), is not a proper form of suit because that would render Section 80 otiose and meaningless. "Whatever may be the position after the Indian independence Act, the suit must be against one or the other railway administration or both. Suing the Governor-General would not make the railway administration a party as it is not only contrary to the scheme of the Act but would also make Section 80 of the Act inoperative."

But even after 1950, the section has been allowed to remain just as before, without any material adaptation or amendment, and the ruling continues to be good authority. It is unnecessary to cite the rulings of the other High Courts which are to the same effect. Thus the failure of the plaintiff to implead either of the railways is fatal to his suit.

Certainly, we are of the view that an omission like this could have been remedied by a formal amendment; but the plaintiff failed to do so even after the omission was pointed out in the written statement ("Other objections" (d)).

Ground No. (i) (c):--The goods were received at Sehore on 22-11-1954 when the plaintiff himself went and noted that they had been "heavily damaged." The plaintiff himself states in the plaint:

"When this consignment arrived at Sehore railway station, it was found to have been heavily damaged and many parts of the same were missing,"

Again in his evidence,--

"When the goods arrived at Sehore station, I found that the whole lot had got, broken because the wire-rope by which they had been secured, had given way and many parts had gone. I pointed this out to the Station Master and said that I would take open delivery only."

The preliminaries for open delivery took nearly four months and the goods were actually handed over after an assessment of damages after 13-3-1955; but even, on 22-11-1954, the plaintiff was admittedly aware of the damage, compensation for which he is now claiming in his suit. Limitation is therefore under Article 30; the time allowed is one year and the terminus a quo is "whenever(?) the lessor injury occurs". The plaintiff could not know it when it actually happened, but he knew it on 22-11-1954; he should therefore have filed the suit before 22-11-1955; but he actually did so on 24-2-1956. We find nothing in the argument that the starting point should be the date of the open delivery that is 15-3-1955. It is conceivable that in some cases, the plaintiff is ignorant of the loss or damage till he actually takes delivery of the goods; but in this case, he himself admits that he noted the damage much earlier.

It is pointed out on behalf of the plaintiff that the defendant himself has not pleaded clearly the limitation on this ground; no doubt, he has generally asserted that "the suit is time-barred" but a general averment like this is really of no value

because the other party is still in the dark as to the manner in which the suit is being described as time-barred. A plea of limitation is altogether no good unless it sets out the term allowed by law, the terminus a quo, and the date of the filing of the suit. Only in that event would it be possible for the opposite party either to plead a step in aid, or pray for condonation on sufficient cause, or to admit limitation. Thus in this suit limitation, under Article 30, has not been expressly pleaded. Still it does not help the plaintiff. One has, in this respect, to distinguish between a case where limitation is an arguable point and has therefore to be pleaded, and one where it is patent and non-controversial on the proved facts. Here, for example the two crucial dates are on the plaint itself and do not admit of the least doubt or controversy. Thus under Sec. 3 of the Limitation Act, the Court has to dismiss it whether or not limitation has been set up as a defence.

Ground No. (ii):--In view of the foregoing discussion, it is necessary only to touch on the other grounds generally for the sake of completeness. There is no doubt that here the plaintiff should prove the misconduct on the part of the railway administration. The goods were received "at owner's risk" and therefore u/s 74-C, the administration shall not be responsible for the damage to the goods except upon proof that it was due to the negligence or misconduct on the part of the servants. The plaintiff has tried to bring the case u/s 74-D; but a mere reading of that section would show that neither Sub-section (a) nor Sub-section (b) applies. In the evidence he has brought out, firstly, from the administration's own officer, who examined the goods before open delivery, that the damage could not have happened by the mere jolting within the wagon during motion and shunting, and that the boiler must have fallen down before sustaining the damage. In the absence of any alternative theory, this has to be accepted. Secondly, the plaintiff has shown what is obvious in any event that the boiler arrived in a wagon different from the one his agent had loaded it at Kanpur. Thirdly, he has shown that a Train-Examiner, called by the administration, noted that this consignment had gone off balance while on the rails during transport.

It is to be remembered that we are dealing with a wagon load of about three tons consisting of heavy elements secured by a wire rope. If it got out of balance, it might have pushed the wagon off the rails, and might have even pulled away one or more of the attached wagons. The train-Examiner accordingly disconnected and pushed on the wagon to some yard for some "readjustment", this obviously means securing a proper balanced distribution of the load. How this was done the administration does not at all indicate; it does not show either that in the circumstances, no more care and skill could have been used, or that the boiler fell down on some other occasion. Thus the plaintiff has shown all that he could in the circumstances. No doubt the initial burden was on him but he can be expected only to give the materials within his reach. In this case, he has succeeded in establishing that the goods in the wagon were removed and reloaded by the servants of the railway administration in his absence. After this, it was for the latter to show that this was necessary because of an emergency,

and at the place and time where the emergency occurred, more care could not have been exercised, and the fall prevented, or the reloading in a new wagon effected in a more satisfactory manner.

Time and again, our courts have disapproved of the apparently clever position taken by litigants in our country, of entrenching themselves on a theoretical burden of proof on the other party, and refusing to place on record materials solely and wholly within their knowledge, and then defying the other to discharge its burden; (vide *Murugesam Pillai v. Gnana Sambandha Pandara Sannadhi* AIR 1917 PC 6, *Rameshwar Singh v. Bajit Lal* (AIR 1929 PC 95); *Hiralal and Others Vs. Badkulal and Others*, . In the instant case, the plaintiff has discharged the burden by showing interference by the administration, and the administration for its part who is in the best position in this regard, has failed to show that in the emergency that arose, they could have done no better and the damage was inevitable and beyond their control. Thus on the negligence or misconduct, the plaintiff has proved his case.

Ground No. (iii):--The administration assesses the damage at the time of open delivery at Rs. 1600/-. The plaintiff did not accept it and has claimed Rs. 4700/-, as he asserts, according to the assessment by a well known engineering firm whose assessors the plaintiff has not called. On the other hand, the plaintiff has stated the price of the consignment as Rs. 12,000/- which has not been challenged . It would be possible, on a full examination of the evidence, to arrive at a valuation in between the two extremes. But it is unnecessary in view of the findings on grounds Nos. (i), (ii) and (iii).

The result is that the appeal of the plaintiff is dismissed. Costs and pleaders fee payable by the plaintiff-appellant to the defendant-respondent.

Shrivastava, J.: I agree.