
(1949) 07 CAL CK 0031
In the Calcutta High Court
Case No : Suit No. 1679 of 1946

Dunlop Rubber Company (India) Ltd.

APPELLANT

Vs

Governor-General in Council

RESPONDENT

Date of Decision : 22-07-1949

Acts Referred:

Citation : (1949) 07 CAL CK 0031

Judgement

Sinha, J.—This is a suit for recovery of Rs. 14,068-12-0 as damages on account of non-delivery by the Bengal Nagpur Railway of certain goods of which the Plaintiff was the consignee.

2. The Plaintiff carries on business as manufacturers of motor car and cycle tyres and for the manufacture of such tyres the Plaintiff company imports cotton-twists from Madura.

3. It is common case that on September 9, 1945 and September 12, 1945, two consignments of cotton-twists were tendered by Madura Mills, Limited, at Madura station on the South Indian Railway for carriage and for delivery to the Plaintiff at Shalimar. The first consignment consisted of 30 bales and 32 cases of cotton-twists booked under invoice No. 63 and railway receipt No. 1950/70. The second consignment consisted of 100 bales of cotton-twists booked under invoice No. 64 and railway receipt No. 1954/4. The consignments were covered by risk note Forms A and Z.

4. The first consignment arrived at Shalimar on September 22, 1945. The goods arrived in two wagons, viz., East Indian Railway wagon 717 containing 18 bales and 17 cases and M.S.M. Wagon No. 3088 containing 12 bales and 15 cases. The second consignment arrived at Shalimar on 23rd and 27th September, 1945. Sixty bales arrived in North Western Railway Wagon No. 20716 and 40 bales arrived in M.S.M. Wagon No. 2121.

5. On September 26, 1945, 60 bales were delivered under shed delivery order No. B. 25930. On September 29, 1945, 18 bales were delivered under shed

delivery order No. B. 78490. On October 3, 1945, 40 bales were delivered under shed delivery order No. A. 03952. On November 3, 1945, 17 cases were delivered under shed delivery order No. B. 78490. The shed delivery order for the remaining 12 bales and 15 cases was presented to the shed in charge. The 12 bales could not be found in the shed and were not delivered. The shed delivery order was returned.

6. The Calcutta Steam Navigation Co., Ltd., are the clearing agents of the Plaintiff. The Calcutta Steam Navigation Co. wrote to the Claims Officer, Bengal Nagpur Railway, on October 24, 1945, requesting that their claim for the value of 12 bales should be registered. On February 21, 1946, 15 cases were delivered. The shed delivery order was then surrendered to the railway.

7. The shed in charge reported to the station master that 12 bales could not be traced. Thereupon there was a joint enquiry by one Mahadeb Chandra Manna, the then shed-supervisor at Shalimar and one Ram Chandra Pratihari, the representative of Calcutta Steam Navigation Co., Ltd. The enquiry was directed to find out if any bales had been delivered in excess. The two officers went to the Salkia godown of the Plaintiff and they found 10 bales under invoice No. 63 had been delivered to the Plaintiff, in addition to the 18 bales delivered under shed delivery order No. B. 78490.

8. It will be remembered that the total number of bales consigned under the two invoices to which I have made reference is 130, 100 bales under invoice No. 64 and 30 bales under invoice No. 63.

9. There is no dispute that 118 bales had been delivered under the said two invoices and that the Defendant failed to deliver two bales covered by invoice No. 63. There is also no dispute that 32 cases were delivered. The dispute is whether the remaining 10 bales had been delivered by the Defendant to the Plaintiff.

10. The Defendant maintains that the Plaintiff's clearing agents received delivery of 60 bales and 40 bales under invoice No. 64 and duly receipted the relevant shed delivery orders, namely, shed delivery order No. B. 25930 and No. A. 03952. They also received 18 bales of invoice No. 63 under shed delivery order No. B. 78490. The only question, therefore, is whether the remaining 10 bales covered by invoice No. 63 had been delivered or not. The Defendant's contention is that the ten bales covered by invoice No. 63 had been delivered because they were found on enquiry in the Plaintiff's godown. There is, therefore, no non-delivery except with regard to two bales only for which the Defendant accepts liability.

11. The Plaintiff's case is that in all 118 bales were delivered under shed-delivery order No. B. 25930, B. 78490 and A. 03952. It is true that shed-delivery orders No. 25930 and No. A. 03952 were in respect of invoice No. 64 and they were receipted, but the Defendant did not deliver the bales covered by invoice No. 64, but included in such delivery 10 bales covered by invoice No. 63 with the result that 10 bales covered by invoice No. 64 were not delivered. The numbers

of those bales are: 7390, 7392, 7395, 7399, 7404, 7442, 7456, 7464, 7465 and 7475. At the time of taking delivery the bale numbers are not checked. The total number of packages is counted. The bales covered by the two invoices were of the same size, description and weight. At the time of taking delivery the bale numbers which were delivered under shed delivery order Nos. B. 25930 and A. 03952 were not compared and checked with the result that 10 bales were purported to be delivered under invoice No. 64 which were really covered by invoice No. 63. Therefore, there was non-delivery of 10 bales covered by invoice No. 64.

12. On July 13, 1946, notice was given u/s 80 of the CPC and on November 11, 1946, this suit was filed.

The following issues were settled:

1. Has the Court jurisdiction to entertain this suit?
2. Did the Plaintiff receive the entire consignment booked under invoice Nos. 63 and 64 less two bales as alleged in the written statement?
3. Did the railway administration fail to deliver any and if so, how many bales out of the consignment mentioned in the plaint?
4. Was non-delivery of any of the bales due to misconduct on the part of the railway administration or its servants?
5. Has the Plaintiff suffered any, and if so, what damages by reason of the misconduct of the railway administration, if any ?
6. Is the notice u/s 80 of the Code of Civil Procedure, dated July 13, 1946, good and sufficient?
7. To what relief, if any, is the Plaintiff entitled?

Issues 2 and 3:

2. Did the Plaintiff receive the entire consignment booked under invoice Nos. 63 and 64 less two bales as alleged in the written statement?
3. Did the railway administration fail to deliver any, and if so, how many bales out of the consignment mentioned in the plaint?

I will deal with these issues together.

[Here the Court discussed the evidence.]

13. I am, therefore, of the opinion that the 10 bales which were found in Salkia godown bearing bale numbers of invoice No. 63 were in fact delivered as part of invoice No. 64 under shed delivery orders Nos. B. 25930 and A. 03952. It follows that the Defendant did not deliver the 10 bales of invoice No. 64.

Issue No. 4:

Was non-delivery of any of the bales due to misconduct on the part of the railway administration or its servants?

14. The plaint alleges failure to deliver 12 bales and that no delivery was due to misconduct on the part of the railway. In the written statement it was denied that the railway had failed, to deliver 10 bales to the Plaintiff's agents and that the alleged non-delivery was due to misconduct. It was also stated that there was no question of any misconduct as the goods had in fact been delivered. The real issue, therefore, was whether there was non-delivery of the 10 bales or not. If, there is non-delivery by the railway of goods tendered to them for carriage they are liable as a bailer. It is, however, urged that the two consignments were covered by risk note Form Z. By signing the risk note form the Plaintiff agreed and undertook to hold the railway administration harmless and free from all responsibility for any "loss, destruction or deterioration of or damage" to all or any of the consignments from any cause whatever, except in cases when such loss, destruction, deterioration or damage arose from misconduct on the part of the railway administration. It is to be observed that in the risk note the Plaintiff agreed to hold the railway administration free from responsibility, not in all cases of non-delivery, but only where non-delivery was due to "loss, destruction or deterioration or damage to the consignment". In order to take advantage of the risk note the Defendant must, therefore, prove that non-delivery was due to the reasons mentioned in the risk note, viz., loss, destruction, etc. Non delivery does not necessarily mean loss. This point was considered by my learned brother Chatterjee J. in *Jolli v. Dominion of India* ILR (1950) Cal. 142. where, after dealing with the relevant authorities, he observed as follows:

Non-delivery of goods may be due to the fact that goods are being deliberately detained by the railway company, or that they have been mis-delivered to some person, or that they are "lost". Non-delivery may be due to "loss" or it may be due to other causes.

15. In the written statement it was not alleged that the goods were lost. In fact it was difficult to allege loss because it would run counter to the positive case made by the Defendant that the ten bales had been delivered. No issue on the point was raised. It is true that in the evidence adduced on behalf of the Defendant it was stated that goods were missing and were not traceable. But I cannot attach any importance to the evidence having regard to the fact that loss was not pleaded and no issue on the point was raised. If the issue had been raised, the Plaintiff could have given evidence to prove that there was no loss. The Defendant, therefore cannot take advantage of the agreement contained in the risk note form Z, and in my opinion, it is not necessary for the Plaintiff to prove misconduct.

16. Even if I allowed the Defendant to prove "loss" without pleading it and raising an issue on that point, the Defendant cannot succeed. The proviso to risk note Z makes it incumbent on the railway company to disclose to the Plaintiff, before the filing of the suit, as to how the consignment was dealt with during the time it

was in the possession of the railway company, and at the hearing, it is for the railway company to give evidence, as to the nature of its dealings with the consignment during the time it remained in its possession before the Plaintiff Sis called upon to prove misconduct. In Jalli's case (*supra*) my learned brother Chatterjee J. considered the relevant authorities and observed as follows:

The language of Risk Note "B" is clear. If necessary, the Railway Administration shall be bound to give evidence thereof before the consignor is called upon to prove misconduct. Reading the whole proviso it means that it is incumbent on the railway to give evidence as to how the entire consignment was dealt with throughout the time it was in its possession or control. Unless and until that is done, there is no obligation cast upon the consignor to prove any misconduct. Governor-General of India in Council Vs. Visheshwar Lal, . If the Railway fails to make the requisite disclosure or to adduce the requisite evidence, the Railway must be made liable for the goods and is not entitled to invoke protection or immunity on the basis of the Risk Note "B". No evidence has been adduced in this case with regard to the Railway's dealing with the entire consignment and there has been a breach of the contractual obligation on the part of the Railway to adduce the requisite evidence. The Railway is not entitled to call upon the Plaintiff to allege or prove misconduct on the part of the Railway administration or its servants. Really, we have not got to the stage where the question of misconduct arises and the Risk Note does not come into play and the Railway must pay compensation for the non-delivery of the goods consigned.

17. In this case the Defendant gave evidence that the two consignments were correctly unloaded and were separately stacked in the railway shed. There is no evidence as to how the goods were dealt with after they were stacked. Some time elapsed between the stacking and the delivery. There is no evidence of the man who was in charge of the goods in the interval. Chittaranjan Mukherji's evidence is that after the goods are unloaded and stacked, they remain in the shed, in charge of the Watch and Ward Department. No one has been called from the department who was in charge of the goods. It is difficult for the Plaintiff to prove misconduct unless evidence is tendered of the person or persons who were in charge of the goods during the material period. As Gentle J. observed in *Raigarh Jute Mills Ltd. v. Commissioners for the Port of Calcutta* AIR (1947) Cal. 98:

It is not sufficient for some evidence to be given, but the evidence must be comprehensive and relate to all the dealings with the consignment.

18. In this case, the evidence relating to all the dealings with the consignments was not given. The Plaintiff is not, therefore, called upon to prove misconduct.

19. I also hold on the evidence, if necessary, that the "loss" was due to misconduct of the railway administration. It is submitted that negligence is not necessarily misconduct. Even so, the evidence gives rise to an inference of misconduct. The System which is followed for giving delivery from the shed is

defective. Mahadeb Chandra Manna said that the shed in charge supervised the removal of goods from the shed. There was no other check. No watchman was posted at the gate through which goods are removed for transporting them by boat." The boat pass is issued after the removal of the goods was complete. Goods of more than one consignment remained stacked in the shed and the shed in charge might keep his eye on the goods of one particular consignment and in so doing he would not be paying attention to goods of other consignments which were to be or were being removed (Manna Q. 102). These facts, in my view, raise an inference of misconduct on the part of the railway administration.

Issue No. 1:

Has this Court jurisdiction to entertain the suit?

20. It is contended that the entire cause of action arose outside the jurisdiction of this Court, and therefore, this Court has no jurisdiction to entertain the suit.

21. On behalf of the Plaintiff it is contended that part of the cause of action arose within the jurisdiction of this Court, inasmuch as notice u/s 77 of the Indian Railways Act and u/s 80 of the CPC were issued from a place situate within jurisdiction. The notice u/s 77 was also delivered to the Defendant within jurisdiction. Section 77 of the Indian Railways Act provides that a person shall not be entitled to compensation for loss, destruction, deterioration of animals or goods unless the claim for compensation has been preferred in writing by him or in his behalf to the railway administration within six months from the date of delivery for carriage by railway. If this suit is regarded as a suit for compensation for loss, notice u/s 77 is a part of the cause of action, because right to compensation is dependent on the notice, which is therefore a fact necessary to be proved in order that the Plaintiff may succeed in the suit. It was held so by Lord-Williams J. in *Gulab Rai Paliram v. Secretary of State for India* in Council ILR (1941) Cal. 160. I respectfully agree with that judgment.

22. It is next submitted that notice u/s 80 of the CPC was issued from Calcutta within the jurisdiction of this Court. That notice is the part of the cause of action in, this suit. Therefore, the cause of action arose in part within the jurisdiction.

23. On behalf of the Defendant it is contended that notice under 8. 80 cannot be a part of the cause of action, inasmuch as Section 80 provided that the cause of action must be stated in the notice. It is said that the Plaintiff must have a complete cause of action before he can issue notice u/s 80 and that issue or service of notice cannot be a part of the cause of action.

24. In the case of *Engineering Supplies Ltd. v. Dhandania and Co.* ILR (1930) Cal. 539, 544, Rankin C.J. observed as follows:

During the controversy as to the meaning of the phrase "Cause of action" after much difference of opinion a working definition had been arrived at in England long before 1908--indeed a very considerable time before that year--and the learned Judge has founded his opinion upon that definition which is, I think,

generally recognised. The only definition that will work, if it has to be applied to cases of all kinds, is the entire set of facts that gives rise to an enforceable claim, or, in the words of lord Justice Fry, "everything which if not proved gives the Defendant an immediate right to judgment" "every fact which is material to be proved to entitle the Plaintiff to succeed, every fact which the Defendant could have a right to traverse."

25. This was the result of many years" consideration as expressed in the case of *Read v. Brown* (1888) 58 L.J. (Q.B.) 120 and *Cooke v. Gill* (1873) L.R. 8 C.P. 107.

Rankin C.J. again observed as follows at pp. 545-546:

It does not seem to me when we are dealing with the phrase "where the cause of action wholly or in part arises" that we have necessarily to ask ourselves in what place, for the purpose of international law or otherwise, is the contract to be deemed to have taken place. We have to ask ourselves whether something, which the Plaintiff is obliged to prove as a fact in order that his case may succeed is a thing which took place within Calcutta. If it is, it seems to me to be no answer to say that what took place in Calcutta was not by itself a contract and it seems to me to be wrong to introduce notions, which depend upon the view that a contract, which was in fact made by people at different places, was made in the place where the last assent was given. Strictly a contract is not a fact but an obligation which may result from series of facts.

26. It seems to me that what I have to ask myself is whether something which the Plaintiff is obliged to prove as a fact in order that its case may succeed is a thing which took place within Calcutta. It is beyond doubt that the Plaintiff, in order to succeed, must prove that notice was given in compliance with the provisions of Section 80 of the Code. Section 80 prohibits the institution of any suit against the Crown or against a public officer without a notice being served and a statement that such a notice has been delivered has to be stated in the plaint itself. If the definition of the cause of action appearing in clause 12 of the Letters Patent is as was stated by Rankin C.J. in the said case, I do not see how it can be said that notice u/s 80 is not a part of the cause of action. The issue and service of notice is a fact material to be proved to entitle the Plaintiff to succeed and the Defendant has a right to traverse the allegation "that notice was given.

27. In my opinion, therefore, notice u/s 80 is a part of the cause of action within the meaning of that phrase in Clause 12 of the Letters Patent.

28. The meaning of the phrase "cause of action" in Section 80 of the CPC and in Clause 12 of the Letters Patent may not be the same as the context is different. Section 80 was enacted in order that the Crown might get notice of an intended suit in order to make amends before the suit is filed. The facts which are stated in the notice u/s 80 are facts which are sufficient to give the Crown or the public officer an idea of the nature of the case intended to be made for obtaining reliefs which are to be claimed in the intended suit.

29. In any event, if the definition of the phrase "cause of action" adopted in English cases and in this Court is accepted as correct, I do not see any escape from the conclusion that a part of the cause of action in this suit arose within jurisdiction.

30. I, therefore, hold that this Court has jurisdiction to entertain this suit.

Issue No. 6:

Is the notice u/s 80 of the Code of Civil Procedure, dated July 13, 1946, good and sufficient?

31. It is submitted that notice u/s 80 of the CPC given by the Plaintiff is not good and sufficient. It is contended that the Plaintiff alleged loss owing to the negligence of the railway or its servants and alternatively failure to deliver. In the notice misconduct was not alleged and therefore the Plaintiff cannot sue for damages for loss of goods.

32. As I have already said the plaint was filed not on the basis that the goods were lost but that the Defendant had failed to deliver the goods to the Plaintiff. In other words, the suit was based on non-delivery. The Plaintiff pleaded misconduct in not taking proper care of the goods while they were in the custody of the Defendant. The suit was not based on loss and it was not necessary to allege misconduct in the notice. In fact it is for the Defendant to allege loss and claim exemption from liability for such loss. Even if the Plaintiff alleged loss and misconduct on the part of the Defendant or its servants the notice would have been sufficient. The notice is intended to give the Defendant an idea of the nature of the case intended to be made for the reliefs claimed. The notice sets out the facts constituting the cause of action with sufficient particularity and it is in my opinion hyper-criticism to say that the notice is not good and sufficient.

Issue No. 5:

Has the Plaintiff suffered any, and if so, what damages by reason of the misconduct of the railway administration of any?

33. As regards the damages claimed, Amulyadhan Ray Chaudhuri and Sanat Kumar Pyne were called as witnesses by the Plaintiff. They proved by the production of bills that the proportionate price of the twelve bales of cotton-twists and the proportionate freight and insurance charges amounted to Rs. 14,068-12-0 which had been paid. The evidence is also that there is no market for these goods in Calcutta. These goods were specially manufactured for the Plaintiff by the Madura Mills and they were not obtainable in the market. The calculation was made on the basis of 420 lbs. which was the standard weight of each bale. The price of the goods was the same during the period July to December, 1945.

34. The result is that there will be a decree in favour of the Plaintiff for Rs. 14,068-12-0 on account of damages which is the amount claimed in the plaint. The

Plaintiff is also entitled to the costs of the suit on the defended scale. Certified for two counsel.