

**(1951) 02 AHC CK 0003**

**In the Allahabad High Court**

**Case No :** Second Appeal No's. 112 and 113 of 1948

Governor-General in Council

APPELLANT

Vs

Firm Badri Das Gauri Dutt

RESPONDENT

**Date of Decision :** 26-02-1951

**Acts Referred:**

Contract Act, 1872 — Section 28  
Railways Act, 1890 — Section 72

**Citation :** AIR 1951 All 702 : (1951) 21 AWR 658

**Hon'ble Judges :** Agarwala, J

**Bench :** Single Bench

**Advocate :** Gopalji Mehrotra, for the Appellant; Harnandan Pd., for the Respondent

**Final Decision :** Dismissed

## Judgement

Agarwala, J.—These are two connected appeals by the deft, the Governor-General in Council arising out of two suits for recovery of loss suffered by the pltf.-resp. firm. The facts are that in S. A. No. 113 of 1948, arising out of suit No. 773 of 1944, the pltf. firm delivered one bale of cloth to the railway at Wadi Bunder for carriage to Basti for delivery to the pltf. This bale was received at Basti railway station on 11-6-1943. It was in a loose condition when it reached its destination. In the other suit, i.e., No. 774 of 1944, which has given rise to S. A. No. 112 of 1948 one bale of cloth was delivered to the Bombay- Baroda & Central India Railway at Ahmedabad on 1-5-1943 for carriage to Basti for delivery to the pltf. This bale reached its destination on 11-5-1943, one month earlier than the previous bale, but was in a damaged condition. On or about the dates when the bales arrived at Basti, the pltf. asked the railway clerk in charge of making delivery at Basti to give open delivery of the bales. The railway clerk said that he would forward the request to the authorities, because, according to him, open delivery could only be made in the presence of the Traffic Inspector. There was some delay with regard to this matter & open delivery was eventually effected in both cases on 20-8-1943, i.e., in one case more than two months

later & in the other case more than three months later. When open delivery was given a shortage in quantity was found in both the bales. In one bale there were 12 dhotis missing & in the second, bale two thans of voile were missing & some of the thans were found damaged due to rain. The pltf. then filed two suits which have given rise to these appeals for recovery of damages on three counts, (1) due to short delivery, (2) due to rain, & (3) due to delay in delivery as the market price of the goods had fallen on the date on which the delivery was actually effected.

2. In defence various pleas were taken. The trial Court held that since the pltf. had not given notice under s, within the period of six months, he could not recover any damages for loss due to short delivery & on account of rain, and his claim on these counts was dismissed. But his claim with regard to loss on account of delay in making the delivery was decreed. It was held that the market rate had gone down & the pltf. had suffered a loss on that score. The lower appellate" Court confirmed the decree of the trial Court. In these second appeals the only question before me is whether the pltf. was entitled to recover damages on account of delay in making open delivery.

3. The lower appellate Court has remarked that the railway is not legally bound to give open delivery. Learned counsel appearing on behalf of the pltf. has drawn my attention to Clause (4) of the rules printed at the back of the railway receipt under which consignments were booked. Clause (4) is in these terms :

"That all claims against the railway for loss or damage to goods, must be made to the clerk in charge of the station to which they had been booked before delivery is taken & a written statement of the description & contents of the articles missing or of the damage received, must be sent forthwith to the Chief Traffic Manager, Bombay or to the District Traffic Superintendent of the district in which the forwarding or receiving station is situated; otherwise the railway will be freed from responsibility."

It appears to me that this rule is a rule of guidance & not of law. It is not open to the railway to repudiate its liability if the claim is not made immediately to the clerk in charge & is not forwarded to the Traffic Manager forthwith, because the observation of this rule would be contrary to the provisions of law relating to limitation for suits (vide Section 28, Contract Act); (SIC) also the railway administration is not bound to give open delivery, although the rule cannot be complied with unless open delivery is given. The rule, as I have said before, is a rule of guidance intended to prevent frivolous & false claims being made & should be observed, but it cannot be said that it is legally binding. No rule requiring open delivery to be made by the Traffic Inspector has been shown to me & therefore, it would appear that the railway clerk in this case should have given open delivery when demanded by the pltf. It cannot, however, be said that he was bound to do so. If he failed or refused to give open delivery when demanded by the pltf. the proper course open to the pltf. was to take delivery as it was given & then to make his claim to the railway authorities within the period

allowed by law. The conclusion, therefore, to which I have arrived at is that the railway administration is not bound in law to give open delivery on the demand of a consignor. If that is so any delay in effecting open delivery in pursuance of the wishes of the pltf. cannot make the railway administration liable for any loss on account of fall in the market price of the goods. In this connection reference may be made to a decision of this Court, *Jwala Prasad & Co. v. G. I. P. Railway* 11 A. L. J. 772.

4. In *Jwala Prasad*'s case, the pltf. had a consignment of wine sent to him from Bombay to Allahabad. The consignment was well packed in boxes that had small metal clips on the edges & also had the usual pieces of wire round them which were so sealed as to make it impossible to open the boxes without breaking the wires & seals. When the consignment was weighed at the time of taking delivery of the goods, it was found that the actual weight was less than what was entered in the receipt & the clips of two of the boxes were also found to be loose. The pltf. thereupon demanded that before he took delivery of the consignment, the railway company should open the boxes & examine the contents. The railway company refused to do so & he in return refused to take delivery. It was later discovered that there was no actual shortage & the weight entered in the railway receipt was an error. The suit for damages for loss due to late delivery was dismissed. Tudball J. observed:

"The question is whether or not the railway company has committed any wrong by reason of which damage has accrued to the pltf. The wrong alleged is the refusal to grant the "open delivery". The learned vakil for the pltf. is unable to show me any rule of the law or any rule of the railway under which in circumstances like the present, a consignee can demand that the railway company shall open a consignment & allow him to examine it before giving up the railway receipt. He admits that the consignment had been re-weighed on arrival. It cannot be contended for a single instant that the consignment showed my external marks of damage. It seems to me that the pltf's action, though entirely bona fide was mistaken. What he ought to have done was to enter on the back of the receipt the fact that the actual weight was less than that entered in this receipt & also the fact that the goods clerk had refused to open & examine the consignment. He should then have signed the receipt, tendered the freight & taken delivery. It would then have been open to him to examine the consignment, either at the goods shed in the presence of the goods-clerk or elsewhere & he then would have had a good case against the company for recovery of damages for the loss sustained, if any."

5. I think that the decision of the Court below was wrong. I, therefore, allow the appeals, modify the decree passed by the Court below & dismiss the pltf's suit in its entirety. In the circumstances of the case I order that parties shall bear their own costs throughout.

6. Leave for special appeal is allowed.