

(1960) 01 CAL CK 0003
In the Calcutta High Court
Case No : A.F.A.D. No. 552 of 1955

Govinda Chandra Nityagopal Shaha		APPELLANT
	Vs	
Union of India (UOI)		RESPONDENT

Date of Decision : 20-01-1960

Acts Referred:

Railways Act, 1890 — Section 77

Citation : AIR 1960 Cal 571

Hon'ble Judges : Bhattacharya, J

Bench : Single Bench

Advocate : Noni Coomar Chakravarti, for the Appellant; Bhabesh Narayan Bose, for the Respondent

Final Decision : Allowed

Judgement

Bhattacharya, J.—In this appeal by the plaintiff-appellant, arising out of a suit for compensation for non-delivery of a part of the consignment, the only point urged is whether on account of non-service of the notice u/s 77 of the Indian Railways Act the plaintiff's claim is liable to be dismissed.

2. The plaintiff was the consignee in respect of two bales of handloom series. At the time of taking delivery on 20-7-1950 at Howrah it was found that the bales were torn. Open delivery however was obtained, and on checking the contents 74 pieces of series worth Rs. 1460/10/- were found short. P.W. Nityagopal Shaha, the only witness examined in this case, stated that at the time of delivery he saw the iron beltings of the bales removed. The learned munsif found that there was no "loss" and that, consequently, the notice u/s 77 of the Indian Railways Act was not essential. The learned lower appellate court inferred "loss". The main reasons appear in the following observations :

"In the present case there is no evidence that at the destination station before the unloading of the bales for delivery to the consignee-plaintiff the bales were intact and that the Railway Administration had received the bales with the full

contents thereof. Therefore, it cannot be said that in respect of 74 pieces of saries pilfered out of the bales there was "non-delivery""

3. There was no evidence on the side of the defendant-railway. In the written statement "Loss" was not mentioned at all. What was stated in this connection (in paragraph 3 of the written statement) was merely that the suit was not maintainable, as no notice u/s 77 of the Indian Railways Act had been served within six months from the date of booking. No facts whatsoever were alleged. In paragraph 4 of the plaint there was a statement to the effect that non-delivery of the goods was due to gross negligence and/or wrongful conversion on the part of the Railway authorities. Prima facie, therefore, it can be said that the case was all along contested on the footing that it was a matter of non-delivery and not of "loss". This "loss" means loss not for the consignor but the loss of the goods for the Railway. Non-delivery may be due to other causes and, as has been observed in *Gopiram Behariram Vs. Agent, East Indian Railway and Agent, Oudh and Rohilkhand Railway*, , it is possible to conceive of cases where goods have not been lost and yet not delivered. The mere fact that something was not delivered, for example, a part of a consignment, is not sufficient to show that there was "loss" within the meaning of Section 77 of the Indian Railways Act, *Union of India (UOI) Vs. Meghraj Agarwalla and Another*, ; and proof of non-delivery is by no means conclusive evidence as to whether or not a loss has occurred. *East Indian Railway Co. Vs. Jogpat Singh*, . It is well settled that loss must not be presumed from short delivery; but if short delivery is the result of loss then notice u/s 77 must be served (*Governor General in Council v. Sarbeswar Das* 83 Cal LJ 165 : (AIR 1949 Cal 420)).

4. In the instant case there was no admission of loss in the plaint; and the written statement was altogether silent on the point of loss. Mr. Bose, learned advocate for the respondent-railway, has urged that in view of the averment in the plaint it was not necessary to refer to any "loss" in the written statement. If the loss be really admitted in the plaint, the onus would no longer lie on the defendant to call evidence upon the point which is admitted in the pleadings and the matter in that case would be treated on the pleadings as one of loss, even though the plaintiff might have framed the suit as one for non-delivery. But paragraph 4 of the plaint referred to above does not speak of any loss. The only statement was that the non-delivery was due to gross negligence and/or wrongful conversion on the part of the railway authorities. This does not certainly indicate any admission of "loss" so far as the plaintiff is concerned. Consequently, it cannot be said prima facie that the defendant was not obliged to plead any loss. The facts were within the special knowledge of the railway authorities, but there was no hint even of any loss. Circumstantial evidence as to the condition of the bales indicated above cannot be deemed to be conclusive in this respect and to infer loss merely because of the condition of the bales would not be justified. Mr. Bose has drawn the attention of the court to paragraph 5 of the plaint which mentions that "necessary statutory notices were served by the plaintiff on the respective railway administration". From this he would infer that

there was a clear reference to a notice u/s 77 of the Indian Railways Act and that by implication the plaintiff admitted that the railway had suffered loss. For this he would rely on the case of Union of India (UOI) Vs. Meghraj Agarwalla and Another, . But unlike that case there is no specific mention in the present plaint that Section 77 does apply. From a mere omnibus statement as to the statutory notices admission as to applicability of Section 77 does not follow irresistibly. In the present case, the plaintiff never sought to show that a notice u/s 77 of the Indian Railways Act had been served. As has been observed by the learned lower trial court:

"No such notice has been proved before this court. Ex. 3 is a letter written to Claims Inspector for getting an open delivery only and it is not a notice u/s 77 of the Act."

Next, Mr. Bose has urged that by mentioning "conversion" in the plaint there was practically an admission of loss. That conversion by the servants of the railway would constitute "loss" is beyond question in view of the decisions in G.I.P. Ry. Co. Ltd. Vs. Jesraj Patwari and Others, , Secy. of State Vs. Surjyamal Haribaksh, and B. N. Rly. Co. v. Nibaran Chandra Bhar 50 CWN 86 : (AIR 1946 Cal 235). But, as has been stressed by Mr. Chakrabarty learned Advocate for the appellant, what was mentioned in the plaint was not conversion by the servants of the railway but merely conversion on the part of the railway authorities, which is perfectly vague and leads nowhere definitely. Moreover, conversion was not the sole factor alleged. It was mentioned in connection with negligence alternatively, as has been referred to above. There was no unequivocal mention of conversion. Further, the allegations clearly were vague, being based on guess. In the circumstances, it would not be proper to infer admission of loss. The net result, therefore, is that there is no admission of loss on the part of the plaintiff; and the defendant-railway never alleged loss, far less proved it. The evidence also does not establish that there was loss of the goods by the railway. In the circumstances Section 77 of the Indian Railways Act does not apply and the suit does not fail for want of notice u/s 77 of the Act.

5. The appeal accordingly is allowed. The judgment and the decree of the learned lower appellate court are set aside and those of the trial court restored. The appellant will get costs, which may be paid up within three months from today along with the compensation.