

(1966) 04 CAL CK 0008
In the Calcutta High Court
Case No : Original No. 1728 of 1955

Hanutram Sohanlal

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 22-04-1966

Acts Referred:

Civil Procedure Code Amendment Act, 1948 — Section 80
Contract Act, 1872 — Section 151, 152, 161
Railways Act, 1890 — Section 3(6), 72, 72A, 74C, 74C(3)

Citation : (1966) 2 ILR (Cal) 585

Hon'ble Judges : A.N. Sen, J

Bench : Single Bench

Advocate : S. Roy and Lal, for the Appellant; S.K. Mukherjea and H.M. Dhar, for the Respondent

Judgement

A.N. Sen, J.—This is a suit for recovery of Rs. 62,000 against the Union of India representing the Railway administration for nondelivery and/or loss of a consignment of one box containing gold chips and/or for wrongful detention or conversion of the same.

2. The case of the Plaintiff as made in the plaint may be briefly noted.

3. On February 21, 1955, Hanutram Sohanlal of Delhi consigned to the Plaintiff one box containing gold chips weighing approximately 26 seers (670 3/4 tolas) from Delhi Station on the Northern Railway for delivery thereof to the Plaintiff in Calcutta at Howrah Station on the Eastern Railway under P.W. Bill No. 433717 dated February 21, 1955. Due declaration had been made to the Northern Railway administration at Delhi at the time of sending the said consignment, that the goods to be carried were gold chips and the consignor paid and/or agreed, to pay the freight and/or charges as required by the Railway administration and the said Railway administration had not demanded or asked for any further or other sum as compensation or otherwise nor had the Plaintiff paid or had been required to pay any further or other sum. The Northern Railway administration

had duly issued the said P.W. Bill to the Plaintiff and had undertaken liability as a bailee or carrier in accordance with the provisions of Sections 152 and 161 of the Indian Contract Act, 1872, for itself and/or on behalf of the Eastern Railway administration. The said consignment had not been delivered to the Plaintiff. The Plaintiff has duly served notices u/s 77 of the Indian Railways Act and u/s 80 of the Code of Civil Procedure. The Plaintiff claims the sum of Rs. 62,000 as the value of the said consignment. In the plaint it has also been alleged that the Eastern Railway administration carries on business at No. 3, Koliaghat Street within the jurisdiction aforesaid.

4. The claim of the Plaintiff is resisted by the Defendant. The main defence of the Defendant is that the consignment had been stolen as a result of a running train theft between Allahabad and Bindhyachal stations on the Northern Railway on or about the night of February 22/23, 1955, in spite of all and due and proper care taken on behalf of the Railway administration under circumstances absolutely beyond the control of the Railway administration. In the written statement filed the Defendant also raises the plea that the articles alleged to have been booked in the said consignment fall under the category of "excepted articles" under Schedule II to the Indian Railways Act and the consignor did not pay nor did agree to pay any extra percentage on the value for the extra risk involved in carrying the alleged articles. It is also not admitted by the Defendant that the consignment contained gold chips and the value thereof was Rs. 62,000. It has also been alleged in the written statement that this Court has no jurisdiction to try and entertain this suit. The following issues were raised:

- (1) Did the consignment contain gold chips weighing 670 3/4 tolas? If so, what was the value thereof?
- (2) Was any extra freight to cover extra risk demanded by the Railway authorities at Delhi? If so, did the Plaintiff agree to pay the same?
- (3)(a) Was the consignment lost, due to running train theft between the stations of Allahabad and Bindhyachal on or about, February 22/23, 1955, as alleged in para. 3 of the written statement?
- (b) Did the Railway authorities take as much care of the goods as was required by law?
- (4) Were the Railway authorities guilty of negligence or misconduct as alleged in the plaint?
- (5) Was there any wrongful conversion or detention of the gold chips by the Railway authorities as alleged in the plaint?.
- (6) Is the notice u/s 77 of the Indian Railways Act valid and sufficient?
- (7) Is the notice u/s 80 of the CPC valid and sufficient?
- (8) Has this Honourable Court jurisdiction to try and to entertain this suit?

(9) To what relief, if any, is the Plaintiff entitled?

5. There is no dispute that the Plaintiff had booked a consignment from Delhi under P.W. Bill No. 433717 dated February 21, 1955, declaring that the consignment contained gold of the value of Rs. 62,000. The Railway authorities had not examined the contents of the consignment and in the said P.W. Bill, the said consignment is described as "said to contain gold valued Rs. 62,000." Naturally the Defendant does not admit that the consignment contained gold or that the value thereof was Rs. 62,000.

6. The first question that comes up for consideration is what were the contents of the said consignment and what was the value thereof. On the evidence on record I am satisfied that the said consignment contained gold chips of the Bitur variety weighing 670 3/4 tolas and the value of the said consignment was Rs. 62,000. Re-kabchand, an employee of the Plaintiff, who had tested the said gold has given evidence. He has stated that he had tested the gold which was pure gold of Bitur variety. It is also his evidence that the gold consisted in chips or bars and the weights were written on the back of each bar. He also states in his evidence that Sohanlal Baid, a partner of the Plaintiff firm had weighed the bars in his presence and the weight of the bars tallied with the weight written on them. He has stated that bijuck (Ex. B) which contains the rates and weight of gold has been prepared by him and is in his handwriting. It is also his evidence that the gold which had been consigned had been locally purchased and the price thereof, was" paid by Sohanlal Baid, a partner of the Plaintiff firm through him and Rekabchand proves the entries in the books of accounts of the Plaintiff firm.

7. Rekabchand also states in detail how the gold has been kept in an almirah which has been securely packed in a wooden case which was booked from Delhi, It is also his evidence that he was present at the Railway station with Sohanlal Baid when the said consignment had been actually booked.

8. Sohanlal Baid, a partner of the Plaintiff firm, has also been examined and he substantially corroborates the evidence of Rekabchand. It is the further evidence of Sohanlal Baid that the value of gold was higher in Calcutta and their firm was sending gold to Calcutta with the intention of making some profit. Lalchand Baid, another partner of the Plaintiff firm to whom the P.W. Bill and bijuck had been forwarded from Delhi for taking delivery, has also given evidence. His evidence corroborates the testimony of Sohanlal with regard to the value of gold being higher in Calcutta and he also mentions about the value then prevailing in Calcutta in Bitur gold.

9. On behalf of the Plaintiff one Murari Mohan Sen, an employee of the Sonapatti Bullion and Merchant Association was also called and this witness produced a book in which market rates of gold collected by the said association are recorded. Murari Mohan Sen has no personal knowledge of the correctness of the entries in the said book and it was also no part of his duty to collect rates from the market. His evidence is unsatisfactory and he really does not prove anything.

10. Mr. Mukherjee, Learned Counsel for the Defendant, has submitted that the Plaintiff had not produced the relevant vouchers and/or receipts showing the prices in respect of purchases made by the Plaintiff and has also not adduced evidence with regard to the market rate of Bitur gold. It may be noted that in course of cross-examination the witness has referred to the existence of such receipts and vouchers and had desired to produce the same.

11. In my view the oral evidence of Rekabchand, Sohanlal Baid and Lalchand Baid and the documentary evidence, namely, the bijuck, the entries in the books and the P.W. Bill itself establish that the consignment contained gold chips weighing 670 3/4 tolas and the value thereof was Rs. 62,000. The bijuck, the entries in the books of account and the P.W. Bill are all contemporaneous documents. There can be no reason why the Plaintiff firm should give any false and incorrect, valuation at the time of booking the consignment. I, therefore, hold that the consignment contained gold chips of the value of Rs. 62,000.

12. It is common case that the Plaintiff had booked the consignment at owner's risk, paying usual freight and had not paid or engaged to pay a percentage on the value declared. It is also an admitted case that the consignment had not been delivered to Plaintiff. It is the Defendant's case that the consignment was lost as a result of a running train theft between Allahabad and Bindhyachal on the Northern Railway administration. It is the further case of the Defendant that the Defendant has no liability for such loss in view of the provision of Section 75 of the Indian Railways Act, as the Plaintiff had not paid or engaged to pay the percentage on the value declared, although so required by the administration.

13. Relevant portion of Section 75 of the Indian Railways Act provides:

75(1). When any articles mentioned in the second schedule are contained in any parcel or package delivered to a railway administration for carriage by railway and the value of such articles in the parcel or package exceeds Rupees three hundred, the railway administration shall not be responsible for the loss, destruction or deterioration of the parcel or package unless the person sending or delivering the parcel or package to the administration caused its value and contents to be declared in writing or declare them in writing at the time of the delivery of the parcel or package for carriage by railway and if so required by the administration, paid or engaged to pay in writing a percentage on the value so declared by way of compensation for increased risk.

14. Mr. Roy, Learned Counsel for the Plaintiff, contends that Section 75 of the Indian Railways Act has no application as there was "no requirement by the administration to pay or engage to pay any percentage of the value declared" and the loss of the consignment has not been established. Mr. Mukherjee, Learned Counsel for the Defendant has submitted that there was a proper and valid "requirement by the administration to pay or engage to pay the percentage of the value declared" within the meaning of Section 75 of the Indian Railways Act and that the loss of the consignment has been clearly established.

15. The questions that fall for consideration are (i) whether there was a requirement by the administration to pay or engage to pay the percentage of the value declared and (ii) whether the loss of the consignment has been established.

16. I shall first take up for consideration the question whether there was any requirement by the administration to pay or engage to pay the percentage on the value declared. Mr. Mukherjee, the Learned Counsel for the Defendant, contends that such requirement is clearly established in this case by the evidence of Darshan Singh, the booking clerk and in any event by the forwarding note which the Plaintiff had to execute for booking the consignment. Mr. Roy, the Learned Counsel for the Plaintiff, argues that no reliance can be placed on the oral evidence of Darshan Singh and that the forwarding note cannot be said to constitute "any requirement within the meaning of Section 75 of the Indian Railways Act".

17. Darshan Singh in course of his examination-in-chief has stated that at the time when he was told that the consignment contained gold and the value was Rs. 62,000, he had informed the consignor's representative who was there to book the consignment, that A percentage of the value declared was required to be paid and had asked for such payment. According to Darshan Singh the consignor's representative had refused to make any such payment and had told him that the consignment would be booked at owner's risk and only usual freight would be paid and the consignor had paid only the usual freight. Darshan Singh in course of his cross-examination, however, admits that he has no recollection of any conversation with any other consignor on that date or on any other subsequent date. It is not the evidence of Darshan Singh that in the usual course of his duty or as a matter of normal routine, he would demand such percentage on the value declared from each and every consignor whenever the occasion would arise. A large number of consignments would be booked and had been booked since 1955 and it is highly improbable that Darshan Singh would remember the particular conversation he had with the consignor's representative about 10 years ago. Sohanlal Baid, a partner of the Plaintiff firm, who had booked the consignment, had denied in course of his evidence that any such demand was made from him by Darshan Singh or any other employee of the Railway, administration. On this state of evidence, in my view, it will "be unsafe to rely on the oral testimony of Darshan Singh to hold that there was any requirement by the administration. Even if Darshan Singh had in fact made any such demand, I have grave doubts whether such demand by Darshan Singh would satisfy the "requirement by the administration" within the meaning of Section 75 of the Indian Railways Act. Administration has been defined in Section 3(6) of the Indian Railways Act which reads as follows:

3(6). "Railway Administration" or "Administration" in the case of a railway administered by the Government means the manager of the railway and includes the Government and in the case of a railway administered by a railway "company, means the railway company.

From the above definition it will appear that any requirement or demand made by Darshan Singh would not be a requirement by the administration within the meaning of Section 75 unless it be established that such power or authority to make such demands had been validly delegated to Darshan Singh, who was the booking clerk. There is no evidence of any such delegation of any such power to Darshan Singh.

18. Mr. Mukherjee, however, contends that the forwarding note which the consignor had to execute for booking the consignment, itself constituted a valid "requirement by the administration to pay or engage to pay a percentage on the value declared" within the meaning of Section 75 of the Indian Railways Act. u/s 72-A of the Indian Railways Act, it was incumbent on the Plaintiff to execute a forwarding note for booking the consignment. The said Section 72-A may be set out:

72-A. Any person delivering to the railway administration any animals or goods to be carried on a railway shall

(a) if the animals or goods are to be carried by a train intended solely for the carriage of goods, or,

(b) if the goods are to be carried by any other train and consists of articles of any of the following categories, namely:

(i) articles carried at owner's risk rates;

(ii) articles of perishable nature;

(iii) articles mentioned in the Second Schedule;

(iv) articles defectively packed or in a defective condition;

(v) explosives and other dangerous goods,

execute a note (in this Act referred to as the forwarding note) in such form, as may be prescribed by the railway administration and approved by the Central Government, in which the sender or his agent shall give such particulars in respect of animals or goods so delivered as may be required.

19. There is no doubt that the provisions of this section with regard to the execution of the forwarding note apply to the consignment in question inasmuch as the consignment was being sent by a parcel train and it contained articles mentioned in the Second Schedule namely, gold. It is also common case that the Plaintiff had in fact executed a forwarding note at the time of the booking of the said consignment.

20. A forwarding note executed on behalf of the consignor has been exhibited being Ex. 1, in this suit. It is, however, the case of the Plaintiff that Ex. 1 is not the original forwarding note which was executed at the time of booking the consignment, but is a duplicate one which had been procured from the Plaintiff at a later stage. It is the Defendant's case that Ex. 1 is the original forwarding note

executed on behalf of the Plaintiff at the time of the booking of the consignment. I shall deal with this aspect of the case later on suffice it to say for the time being, that it is the Plaintiff's own case that the original forwarding note executed on behalf of the consignor is exactly similar to and identical with, the form in Ex. 1. The form of the forwarding note is prescribed by the Railway administration and approved by the Central Government and is included in App. B of the Rules framed under the Indian Railways Act The relevant form of the forwarding note is also printed at p. 936 of the India Railway Act, 3rd, by p. Hari Rao.

21. Clause (2) of the explanatory notes contained in the reverse side of the forwarding note reads as follows:

Railways are not responsible for any loss, destruction or deterioration of or damage to a parcel or package containing any Article (s) specified in the Second Schedule to the Indian Railways Act (IX of 1890) whose value exceeds Rs. 300 per parcel or package unless the contents and value are declared and an engagement entered into to pay the authorised percentage of value charged, if required. The declaration of contents and value must be made in Clause (2) overleaf and the word "engage" or the words "do not engage" struck out according to whether the consignment is to be booked by the Railway with bailee's responsibility or otherwise. The administration hereby give notice that payment of percentage on value charge is required.

22. Clause (2) overleaf referred to in the said explanatory note is to the following effect:

I declare that these packages contain...of a value of Rs...and engage/do not engage to pay the percentage charge on value for increased risk, as required by the administration.

23. Relying on the aforesaid two clauses in the forwarding note, Mr. Mukherjee, the Learned Counsel for the Defendant, submits that the forwarding note constitutes a valid requirement within the meaning of Section 75 of the Indian Railways Act and it is his contention that the last sentence in Clause (2) of the explanatory note namely, "the administration hereby gives notice that payment of percentage on value charge is required", clearly fulfils the condition as to requirement by the administration mentioned in Section 75 of the Indian Railways Act.

24. Mr. Roy, the Learned Counsel for the Plaintiff, contends that there is no requirement in the said clauses within the meaning of Section 75 of the Indian Railways Act and the last sentence in Clause (2) of the explanatory note, merely gives notice of a requirement, but does not constitute the requirement within the meaning of Section 75 of the Indian Railways Act. In support of his contention Mr. Roy argues that requirement can be made only of a definite or ascertained sum and so long as the amount is not ascertained on calculation, there cannot be any valid requirement to pay or engage to pay and as such there can be no valid

requirement within the meaning of (sic) of the Indian Railways Act.

25. On a careful consideration of the respective contentions, I have come to the conclusion that Mr. Roy's contentions are not sound; and in my view the forwarding note constitutes a valid "requirement to pay or engage to pay by the administration" within the meaning of Section 75 of the Indian Railways Act.

26. In my opinion the last sentence of Clause (2) of the explanatory note, which states "the administration hereby give notice that payment of percentage on value charge is required" does not merely give notice of a requirement, but constitutes the requirement itself. When anyone says that "I give you notice that payment of the money is required", he, in reality, says in an active voice that "I give you notice that I require payment of the money"; and this, to my mind, clearly means that he demands payment of the money. The word "hereby" used in the said sentence, in my view, emphasises the aspect of demand or requirement of payment in the notice given. If, in any lawyer's letter of demand, it is stated "I hereby give you notice that payment of the money is required by my client", it cannot be legitimately contended that no demand for payment had been made. When anyone gives a notice that payment is required, he certainly requires or demands payment. When the Railway administration in the forwarding note states "the administration hereby gives notice that payment of percentage on value charge is required", it certainly requires or demands payment of value charge thereby. That a demand or requirement to pay is thereby made, is further indicated by Clause (2) on the main or the obverse side of the forwarding note which reads "I declare that these packages contain...of a value of Rs....and engage/do not engage to pay the percentage charge on value for increased risk, as required by the administration". The words, "as required" in this clause and the reference in this clause to Clause (2) of the explanatory note, make it abundantly clear, to my mind, that a demand or an actual requirement to pay is certainly being made thereby and not a mere notice of any such requirement is being given. It is to be noted that the aforesaid declaration has got to be signed by the consignor and there cannot be any question of making any such declaration as to engagement to pay or not to pay percentage charge unless so required by the administration and the said clause itself makes it clear that such declaration was being made, being so required by the administration.

27. The contention of Mr. Roy that the said clauses cannot amount to any actual requirement within the meaning of Section 75 of (sic) Indian Railways Act as the requirement must be of an ascer-(sic) sum, is to my mind without any substance. Section 75 of the Indian Railways Act speaks of requirement by the administration of payment of percentage on value by way of compensation for increased risk. This percentage depends on the nature of articles and the value thereof. The amount is to be ascertained and is to be determined on proper calculation on the basis of tariff rates fixed. The question of ascertaining the actual amount on proper calculation can arise, only if the consignor on being

required by the administration engages to pay the percentage on value to cover increased risks. By, the forwarding note the administration makes the actual requirement and the consignor, being so required, has to state whether he engages to pay or not to pay such percentage on the value. If the consignor engages to pay the percentage value on such requirement, the actual amount is determined on the basis of rates fixed and the consignor has to pay the amount to appropriate authorities in the manner prescribed for such payment.

28. It may further be noted that Section 75 of the Indian Railways Act provides that the payment or engagement to pay the percentage on the value by the consignor has to be in writing. The forwarding note that the consignor has to execute satisfies the said requirement, as the consignor has to make the declaration in writing on the said forwarding note.

29. There is another aspect which, to my mind, indicate that the aforesaid two clauses have been deliberately inserted in the forwarding note to obviate any difficulty that may arise with regard to the question of such requirement by the administration within the meaning of Section 75 of the Indian Railways Act. Under the provisions of Section 75 of the Indian Railways Act the requirement has to be by the administration, which "means the manager of the Railway and includes the Government" according to the definition of "administration" in Section 3(6) of the said Act. It is not possible for the manager to make such requirement in each and every case. The manager may have the power to delegate to other officers, but the delegation of such powers by the manager is likely to lead to difficult problems. There may be a question of discrimination by the delegated authority and the delegated authority may or may not make demand in each and every case, the administration might be entitled to require such payment of percentage charged. To obviate all these difficulties and to see that the requirement is made strictly in accordance with the provisions of Section 75 of the Indian Railways Act, the said clauses have been inserted in the forwarding note itself. There is no dispute and there can be no dispute that any requirement by the forwarding note is a requirement by the administration as the form of the forwarding note is approved by the Central Government. The forwarding note which is in a statutory form prescribed by the administration and approved by the Central Government removes all possible difficulties with regard to the validity of any requirement by the administration within the meaning of Section 75 of the Indian Railways Act.

30. In this connection it may be noted that Mr. Roy referred to the decision in the case of *Behrens v. Great Northern Railway Company* (1862) 31 L.J. Ex. 299, in support of his contention that an actual requirement is necessary and mere notice is not enough. The said English case came to be considered in the case of *Great Indian Peninsular Railway Company v. Raisett Chandmull* ILR (1894) Bom. 165. Apart from the advisability of applying the decision which deals with the English Carriers Act in considering the provisions of the Indian Railways Act, the decision in the case of *Behrens v. Great Northern Railway Company* (1862) 31

L.J. Ex. 299, in my view, is of no assistance to the Plaintiff in the facts of this case. The facts of the case of *Behrens v. Great Northern Railway Company* (1862) 31 L.J. Ex. 299 are set out in the decision of the trial Court (1861) 158 E.R. 151 and the appeal Court decision (1862) 31 L.J. Ex. 299 is also reported in the same volume of the English Reports at p. 756. It is evident from the facts of the case that no demand of any kind was made in that case and there was no such document like the forwarding note in the present case. The English case was in no way concerned with the construction and effect of a document like the forwarding note which the sender has to execute at the time of booking of such consignment.

31. It will be convenient to consider at this stage whether Ex. 1 is the original forwarding note executed by the consignor at the time of booking or is a duplicate copy subsequently procured by the Railway administration.

32. Sukdayal, the parcel clerk, who had weighed the consignment and whose signature appears on Ex. 1 has given evidence. The substance of his evidence is that Ex. 1 is the original forwarding note in which he had recorded the weight of the consignment after having weighed the same at the time of the booking of the consignment and in which he had put his signature thereafter. It is also his evidence that the original forwarding note remains pasted with the record copy of the Railway receipt. Darshan Singh, the booking clerk who had prepared the Railway receipt, has also given evidence and has stated that Ex. 1 is the original forwarding note which had remained pasted to the record copy of the Railway receipt.

33. Sohanlal Baid, the partner of the Plaintiff firm, who had executed the forwarding note, has given evidence to say that Ex. 1 is not the original forwarding note, but the same had been executed by him very much later at the request of a Police officer and a Railway employee. It is his evidence that it was represented to him that the gold stolen had been recovered, but the forwarding note was lost and it was necessary for him to execute another forwarding note.

34. Mr. Roy has criticised the evidence adduced on behalf of the Defendant and there is force in the criticism of Mr. Roy. Mr. Roy rightly points out that there is discrepancy in the testimony of Darshan Singh and Sukdayal and also in the testimony of Bhagwandas, the guard and Darshan Singh. He legitimately comments that the columns on the reverse side of the Ex. 1 are not filled up and also on the fact that Mehta, the superior officer referred to by Darshan Singh and Sukdayal, a material witness, has not been called.

35. Mr. Mukherjee has submitted that it is common case that Ex. 1 has been executed on behalf of the consignor and if the Plaintiff's case that Ex. 1 was subsequently executed is not accepted, it must follow that Ex. 1 is the original forwarding note executed on behalf of the consignor. Mr. Mukherjee contends that the Plaintiff's case that Ex. 1 was subsequently executed should not be accepted for the following reasons:

(i) If Ex. 1 had in fact been subsequently executed in connection with restoration of gold recovered, the Plaintiff would certainly have stated these facts in some letter and would have asked for the Plaintiff's gold alleged to have been recovered.

(ii) It is unlikely that the Railway administration would fabricate the document and there can be no valid reason for such fabrication.

(iii) Exhibit 1 has been disclosed by letter some time after the affidavits of documents have been filed as "the original forwarding note". The same had been inspected, but no protests had been made that Ex. 1 was not the original and no objection had been taken to the same. The case that Ex. 1 was not the original but a duplicate one subsequently procured, was made for the first time by Sohanlal Baid from the box.

(iv) There is intrinsic evidence in the document itself that this was the original forwarding note which had remained pasted with the record copy of the Railway receipt.

36. Taking into consideration the totality of the evidence and the probability of the case, I am of the opinion that Ex. 1 is the original forwarding note executed by the consignor. It appears to me to be highly improbable that Sohanlal Baid would subsequently execute the, forwarding note under circumstances stated by him and would not write to the authorities, making enquiries of his gold alleged to have been recovered, placing all these facts on record. I further see no reason why the administration should seek to fabricate this document by putting in the weight and signature of Sukdayal thereon. The document had remained with the Railway administration and if it had so desired it could easily have put in the date and filled in all the columns left blank. The gum mark which appears in Ex. 1, clearly indicates that it had remained pasted with the record copy of the Railway receipt. The evidence of the guard Bhagwandas and the production of the record copy through him are not of much consequence. The guard Bhagwandas had a copy of the Railway receipt with him intended for the guard and the copy carried by the guard is similar and identical. When Bhagwandas stated in his evidence with reference to the record copy that he had the said copy with him, he had meant that he had Carried a similar copy. On the copy itself (Ex. 11 in commission) is written "record copy" and the record copy also clearly indicates that Ex. 1 had remained pasted with it. In my view Sohanlal Baid sought to make out this case at the trial with the idea that the Plaintiff firm might thereby circumvent the provisions of Section 75 of the Indian Railways Act. I, however, only wish to add that it is eminently desirable that the employees of the Railway administration should properly discharge their duties and should duly fill in all the columns in the forwarding note, required to be filled in by the employees of the Railway administration.

37. I am further of the opinion that the question whether Ex. 1 is the original forwarding note or a duplicate one subsequently procured, is not really of any

consequence in the facts of this case. It is the Plaintiff's own case that a forwarding note had been duly executed at the time of booking the consignment and that the consignment had been booked at his own risk, paying the usual freight. As in my view the forwarding note itself constitutes sufficient requirement within the meaning of Section 75 of the Indian Railways Act, the consignor by booking the consignment at owner's risk paying the usual freight, had not paid or engaged to pay the percentage on value, although so required by the administration.

38. The next question that comes up for consideration is whether the consignment booked by the Plaintiff under the said P.W. Bill No. 433717 has been lost or not.

39. Loss of the consignment to the consignor or to the consignee does not constitute loss within the meaning of Section 75 of the Indian Railways Act and it is well-settled that to constitute loss within the meaning of the said section, such loss must be to the Railway administration. Loss means "loss of the goods by the railway. The railway must have lost possession of the goods and the railway must have been unable to trace them". See the decision in the case of *G.A. Jolly v. Dominion of India* AIR 1949 Cal. 380.

40. For any application of Section 75 of the Indian Railways Act, it must be established that the consignment has been lost to the Railway administration. I may note that Mr. Mukherjee, Learned Counsel for the Defendant, does not dispute this proposition.

41. It is the case of the Defendant that the consignment in question was lost to the Railway administration as a result of theft on the running train between Allahabad and Bindhyachal. To prove this loss as a result of theft, the Defendant has tendered oral and documentary evidence. Bhagwandas who happened to be the guard in charge of the train at the relevant time and who retired from service on June 6, 1957, has been examined on commission. He has stated in course of his evidence that he took over charge of the train as the guard at Allahabad from S. Kumar, taking from him the relief memo. It is his evidence that when he took over charge from Kumar the consignment in question was in fact in the A.A. Van. According to him two other consignments containing gold which had come from Bombay for being carried to Howrah, had been loaded into the A.A. Van at Allahabad and when the train left Allahabad at about midnight, there were three consignments containing gold in the A.A. Van. He has also stated that after the consignments from Bombay had been loaded into the A.A. Van, doors on both sides of the said van were E.P. locked in his presence and he himself tested the same. He says in course of his evidence that the first stop of the train after leaving Allahabad was Bindhyachal and there he found that the north side door of the A.A. Van was opened and E.P. lock cotter and wedge were missing. It is his evidence that he had immediately contacted the A.S.M. on duty at Bindhyachal and with his assistance had the door opened and had checked the parcels and found that the three gold packages were missing; he informed the A.S.M. that

three gold packages for Howrah had been stolen; the A.S.M. informed the Controller on duty and he had attended the Control Room and had received order from the Deputy Controller to start the train and to take necessary action at Mirzapur i.e., to issue wire of theft and he was told that the Sub-Inspector, G.R.P., Mirzapur, had been advised to investigate the case as there was no higher G.R.P. officer stationed at Bindhyachal. He has proved the message dated February 23, 1955, sent by him from Mirzapur to the Police and also the report made by him regarding the theft. The message sent by him and the reports submitted by him are Exs. 12 and 13 in commission. The evidence of Bhagwandas with regard to the theft of the three gold consignments is not shaken in course of his cross-examination which was mainly directed to establish negligence and lack of proper care in the matter of carrying the consignments.

42. Mr. L. Srivastava who was the Deputy Chief Controller, Northern Railway, Allahabad, at the relevant time and had retired from regular service on August 7, 1956, has also given evidence on commission. He has stated in his evidence that theft of three gold consignments on 72 Down Parcel Express on February 22, 1955, had been reported to him by the Assistant Station Master, Bindhyachal and the guard of the train, Bhagwandas; and he had instructed Government Railway Police, Allahabad, Section Officer, G.R.P., Allahabad, R.P.F., Allahabad and Railway Police and R.P.F., Mirzapur, to make a search. He has further stated that as usual he had made special report to the Divisional Officer. Exhibit 5 is the report made by him and tendered in commission. There was some cross-examination as to whether this report was the original or copy. The evidence suggests that these reports are made in duplicate under carbon process; the first pencil copy is retained for office record and the carbon copy is sent to the officer concerned. Gayaprosad Dhantari, who was Sectional Inspector, G.R.P., D.S. Allahabad and who has retired from service, has also been examined on commission. He has stated in course of his evidence that the investigation of the theft of three gold consignments was entrusted to him. It is his evidence that he had started investigation at once of all the three consignments which had been stolen and he had made a report to Claims Inspector on March 30, 1955. He has proved the report which is Ex. 7 in commission. He has stated that all the accused sent up by him were convicted and it is his evidence that no part of the gold in the consignment in question could be recovered. I see no reason to disbelieve the evidence of this witness.

43. Kailash Behari Verma, another Police officer, who at the relevant time was posted as S.O., G.R.P. at Mirzapur has also given evidence on commission. He has stated that the theft had been reported by Bhagwandas, the guard of the train. It is his evidence that on receipt of the report from Bhagwandas, he had inspected the van with the guard and the A.S.M. on duty and he had found that theft had been committed by removing the E.P. lock. It is his further evidence that he had sent a message to the Sectional Officer, A.L.D. and he has produced a copy of the message. According to him search parties had been organised and he himself had also made searches but he could not find anything in his circle.

44. Jhanjiram who was employed at the relevant time as Sub-Inspector, Mirzapur Railway Security Force, has also been examined on commission. It is his evidence that he received information about the theft from the Deputy Controller, Allahabad, at about 2 a.m. on February 23, 1955, while he was at Chunar and that he had sent a message, number CR 2 Special 55 dated February 23, 1955, which he has proved and is Ex. 2 in commission. He has stated that search parties had been organised and he had thereafter made a report which has also been proved by him and is marked as Ex. 3 in commission. Another report made by him has also been exhibited, being Ex. 4 in commission. He also stated in evidence in his examination-in-chief that no gold was recovered by the G.R.P. and the F.P.F. concerning the case booked under P.W. Bill No. 433717 against delivery to Howrah, but in course of his cross-examination he practically admitted that he had no personal knowledge of the recovery of gold.

45. "Various documents have also been relied upon by the" Defendant in support of the case of theft and loss of the consignment in question. Before I deal with the documentary evidence, I have to observe that I find from the record of the commission proceedings that objections had been taken at the time of tendering of many of the documents. But no such objections were pressed or argued before me at the trial. From the records of proceedings in the commission I, however, find that the documents exhibited therein have been duly proved.

46. The documentary evidence with regard to this aspect of the case mainly consists of the following:

(i) Telegram dated February 23, 1955, from Bhagwandas in which theft and loss of the three consignments of gold are mentioned (Ex. 12 in commission).

(ii) Copy of the telegram dated February 23, 1955, produced by Dhantari which also mentioned about three gold consignments being missing (Ex. 6 in commission).

(iii) Special report of Srivastava to the Additional Officer, which records the loss of the three gold consignments (Ex. 5 in commission).

(iv) Dhantari's report dated March 30, 1955 (Ex. 7 in commission). This report states that the consignment in question had been stolen from the A.A. Van and no gold contained in the said consignment could be recovered.

(v) Report" dated May 14, 1955 by Bhagwandas to C.P. 1, Delhi (Ex. 13 in commission). The report mentions about E.P. locks being broken and three gold consignments being removed.

(vi) Report of Verma dated February 23, 1955 (Ex. 1 in commission). This report mentions about three gold consignments being lost.

(vii) Message No. CR 2 special/55 dated February 23, 1955 by Jhanjiram (Ex. 2 in commission). This message has reference to the theft of the three gold consignments.

(viii) Report of Jhanjiram dated March 15, 1955 to A.S.O., Allahabad (Ex. 3 in commission). This report refers to the theft of the three gold consignments and of the search made.

(ix) Report of Jharijiram dated March 31, 1955 (Ex. 4 in commission). The report mentions about the progress in investigation and recovery of some gold of the value of about Rs. 70,000.

(x) Letter dated July 29, 1955 from Chief Commercial Superintendent to Sri B.K. Mukherjee, Solicitor (P.D. No. 14--D.D. No. 7 at p. 21 of Ex. L.).

This letter also records that the consignment in question was lost in transit due to running train theft between Allahabad and Bindhyachal.

47. Mr. Roy, Learned Counsel for the Plaintiff, has submitted that the Defendant's case of loss of the consignment in question should not be accepted, as such loss has not been sufficiently established for the following reasons:

(a) Kumar, the guard of the train from Kanpur to Allahabad has not been called.

(b) Relief memo of Bhagwandas has not been produced or proved.

(c) Narayan Chandra Bhattacharyya's evidence and the damaged goods return (Ex. 6 in suit) produced by him are not of any consequence.

(d) No inventory has been prepared either at Bindhyachal or at Mirzapur and no such inventory has, in any event, been disclosed.

(e) Records of the criminal proceedings relating to the alleged theft have not been disclosed and have not been exhibited in the suit.

48. Mr. Roy has referred to the decision of the case of Union of India v. D.N. Mondal (1958) 63 C.W.N. 253 in support of his contention that loss must be established by sufficient evidence and unless loss is so established, Section 75 of the Indian Railways Act shall have no application.

49. There is no valid reason for disbelieving the testimony of the witnesses or for not placing reliance on the documents which are mostly contemporaneous. The genuineness of these documents cannot, in my view, be seriously questioned or doubted. Though there is some justification for the comments and criticisms made by Mr. Roy, yet, in my view the evidence on record sufficiently establishes the theft and the loss of the consignment to the Railway administration.

50. Mr. Roy has next contended that even assuming that theft of the consignment is proved, there is no sufficient evidence to establish that the gold which was subsequently recovered was not the Plaintiff's gold, I am unable to accept this contention of Mr. Roy. Taking into consideration the evidence on record and the probabilities of the matter, I am clearly of the opinion that the consignment in question had been stolen and no part of the gold contained in the Plaintiff's consignment had been recovered. I have to note that the case that the Plaintiff's gold has been recovered, has nowhere been made by the Plaintiff and

no such case was suggested to any of the Police officers who have been examined. I therefore hold that the Plaintiff's consignment had been stolen and has been lost to the Railway administration. In view of my above findings there cannot be any question of any wrongful detention or conversion of the gold by the Defendant.

51. My aforesaid findings are sufficient for the purpose of the disposal of the suit; as in view of my findings already recorded, the Railway administration incurs no liability whatsoever for the loss of the said consignment by virtue of the provisions contained in Section 75 of the Indian Railways Act. However, I consider it expedient and desirable to record my findings with regard to the other points which have been raised and argued in this case.

52. The next question that has been raised and argued is the question of care and of negligence and misconduct on the part of the Railway administration. This question becomes material and important only if Section 75 of the Indian Railways Act is not attracted.

53. In view of the provisions contained in Section 72 of the Indian Railways Act, the liability of a Railway administration is that of a bailee under Sections 151, 152 and 161 of the Indian Contract Act, subject to other provisions of the Indian Railways Act.

54. Section 151 of the Indian Contract Act enunciates the general principle that the bailee has to take as much care of the goods as a person of ordinary prudence would take of his own goods; Section 152 lays down that in the absence of any special contract, the bailee will have no responsibility if he has taken the amount of care required u/s 151 and Section 161 of the Indian Contract Act makes bailee responsible for not duly returning the goods by any default of the bailee. Section 74-C(3) of the Indian Railways Act provides:

When any animals or goods are carried or are deemed to be carried at owner's risk rate, Railway Administration shall not be responsible for any loss, destruction or deterioration or of damage, to such goods for any cause whatsoever except upon proof that such loss, destruction, deterioration or damage was due to negligence or misconduct on the part of the Railway Administration or of any of his servants.

55. Relying on the aforesaid provisions in the Indian Railways Act and the Indian Contract Act Mr. Mukherjee, the Learned Counsel for the Defendant, has contended that the amount of care required of the Railway administration in the instant case where the consignment had been sent at owner's risk, should be considered to be less in degree than the amount of care required of a bailee u/s 151 of the Indian Contract Act.

56. Mr. Roy, Learned Counsel for the Plaintiff, relying upon the provisions of Section 74-D of the Indian Railways Act has submitted that there cannot be any different standard of care in case of consignments booked at owner's risk and

that the standard or amount of care is the same in all cases, whether the consignments are booked at owner's risk or at Railway risk. The relevant portion of Section 74-D may be set out:

Notwithstanding anything contained in Section 74-C--

(a) Whether the whole of a consignment of goods or the whole of any package forming part of a consignment carried at owner's risk rate is not delivered to the consignee and such non-delivery is not proved by the Railway Administration to have Been due to any accident to any train or to fire, or

(b) Where...transit, the Railway Administration shall be bound to disclose to the consignor how the consignment or package was dealt with throughout the time it was in its possession or control, but if negligence or misconduct on the part of the Railway Administration or any of its servants cannot be fairly inferred from such disclosure, the burden of proving such negligence or misconduct shall lie on the consignor.

57. It is Mr. Roy's contention that in case of non-delivery of any consignment booked at owner's risk, Railway administration is exempted from any liability, if such non-delivery is due to any accident to the train or to fire, but in all other cases than those covered by accident, fire or by Section 75 of the Indian Railways Act, negligence or misconduct is the determining factor; and no different standards of proof or degree of such negligence or misconduct are contemplated, whether the consignment is booked at owner's risk or otherwise.

58. Section 74-D of the Indian Railways Act really deals with the burden of proving negligence or misconduct. Mr. Mukherjee's contention, though attractive, is to my mind, not sound. There is no provision in the Indian Railways Act which suggests that standard or degrees of care by the Railway administration as bailee, should be different in different classes of booking. As soon as any consignment is accepted by the Railway administration for carriage, whatever may be the nature of booking, the administration becomes the bailee in respect thereof and incurs necessary liability as such bailee as provided in Section 72 of the Indian Railways Act, the scope of which has already been noted. I, therefore, agree with the contention of Mr. Roy that no different standards of proof or degree of negligence or misconduct are contemplated in the case of any consignment booked at owner's risk.

59. Although Section 74-D of the Indian Railways Act deals with the burden of proof, the said question now is not of much consequence, as both sides have led evidence.

60. The evidence on record clearly establishes the following facts : The consignment in question had been loaded into the Arms and Ammunition Van, commonly known for the sake of brevity as A.A. Van. All valuable and insured goods including goods in respect of which percentage value had been paid by consingnors, had been loaded into the A.A. Van and the consignment in question

had been placed along with such valuable articles in the A.A. Van. The A.A. Van has iron floor and E.P. locks in the doors on both the sides. E.P. lock means the Ellis Patent lock and consists of cotter and a steel wedge which is locked in the wagon containing valuable articles and it is locked and opened by a mechanical key only. The mechanical key which locks and opens an E.P. lock is prepared by the Railway, authority in Railway workshop and such keys are only supplied to important stations where insured parcels are generally loaded into or unloaded by parcel express trains. The A.A. Van is placed next to the guard's van and remains under the direct charge, supervision and responsibility of the guard. The consignment in question had remained intact upto Allahabad. At Allahabad guard Bhagwan-das had taken over charge. The E.P. lock had been opened at Allahabad and two other gold consignments which had arrived from Bombay were loaded into the A.A. Van and the A.A. Van had thereafter been E.P. locked. There were no armed guards in the A.A. Van or in the guard's van or anywhere in the parcel train. The A.A. Van containing all the valuable articles including the gold consignments had remained in the charge of the guard only and apart from the guard there was only a parcel clerk whose duty was to look after other packages not contained in the A.A. Van. There have been many cases of theft on 72 Down parcel train near-about Delhi, Kanpur and Allahabad. Within the home signal of Allahabad station, that is, on the Allahabad yard, there is a bridge (bridge No. 83) which was under repairs. Near the bridge the train had halted for about two minutes and the train had thereafter moved at a crawling pace for some time before the train gathered normal speed. No watchman had been posted at the place where the train had halted or at the bridge site.

61. Mr. Roy, Learned Counsel for the Plaintiff, has contended that the negligence or misconduct on the part of the Railway administration mainly consists of not providing watchmen or armed guards in the A.A. Van, in the guard's van and in the train itself; not posting watchmen or armed guards at the place where the train had to halt and at the bridge site where the train had to crawl. Mr. Roy submits that, particularly in view of the fact that there had been frequent thefts on this particular train, it was a clear duty of the Railway administration to provide for sufficient and suitable armed guards or members of the Railway Police force to prevent recurrence of such thefts on this train. Mr. Roy has referred to the decision of the Supreme Court in the case of Union of India (UOI) Vs. Udho Ram and Sons, and has strongly relied on the following observations of the Court at pp. 423-24 of the report:

It may be true that any precautions taken may not be always successful against the loss in transit on account of theft but in the present case there is no evidence with respect to the extent of the precautions taken and with respect to what the railway protection police itself did at the place where the train had to stop. We cannot accept the contention that the railway protection police could not have moved out of the guard's van due to the uncertainty of the stoppage of the train at the signal. It was the job of its members to get down on every stoppage of the train and to keep an eye at the various wagons as best as they

could. There could be no risk of the train leaving them on the spot suddenly. They could climb up when the train was to move. The wagon in which the Plaintiff's goods were, was in the centre of the train. It was the 29th carriage from the other end. It must be taken to be the duty of the railway protection police to get out of the guard's van whenever the train stops, be it at the railway platform or at any other place. In fact, the necessity to get down and watch the train when it stops at a place other than a station is greater than when the train stops at a station, where at least on the station side there would be some persons in whose presence the miscreants would not dare to tamper with any wagon and any tampering to be done at a station is likely to be on the off side.

The responsibility of the railways u/s 72 of the Indian Contract Act is subject to the provision of Section 151 of the Indian Contract Act. Section 151 states that in all cases of bailment, the bailee is bound to take such care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed. Needless to say that an ordinary person travelling in train would be particular in keeping an eye on his goods specially when the train stops. It is not, therefore, imposing a higher standard of care on the railway administration when it is said that its staff and specially the railway protection police specially deputed for the purpose of seeing that no loss takes place to the goods, should get down from the wagon and keep an eye on the wagons in the train in order to see that no unauthorised person gets at the goods.

62. Relying on this decision and the aforesaid observation Mr. Roy has argued that the case of negligence is very much stronger in the instant case, as there was not a single watchman or armed guard or member of the Railway Police in the entire train.

63. Mr. Mukherjee, Learned Counsellor the Defendant, has submitted that there has been no negligence or misconduct on the part of the Railway administration. He argues that full disclosure had been made on behalf of the administration as to how the consignment had been dealt with from the very beginning. He contends that by placing the consignment which was not insured and in respect of which the consignor had not paid the percentage charge, in the A.A. Van in which only very valuable articles and insured goods are kept, the administration had taken more care of the consignment than it really deserved. It is Mr. Mukherjee's contention that an A.A. Van with E.P. locks is considered to be safe if it is attached to the guard's van and the guard himself keeps watch over the same. According to Mr. Mukherjee there was no lack of care on the part of the Railway administration and not posting of watchmen or armed guards of members of the Railway Police does not constitute any negligence or misconduct on the part of the Railway, administration. Mr. Mukherjee has referred to a Bench decision of this Court in the case of *Giridharilal Ramnarayan v. Union of India* Unreported decision of Mukharji and Laik, JJ. dated July 1 and 2, 1964 in F.A. No. 318 of 1956, as owning administering and representing the Western Railway and

the Eastern Railway now South Eastern Railway. P.B. Mukharji, J. who delivered the judgment of the Court observed at p. 21 of the judgment:

The other case on which reliance was placed on behalf of the Appellants was the Supreme Court decision in Union of India (UOI) Vs. Udho Ram and Sons, . There the Supreme Court lays down that the responsibility of the Railway u/s 72 of the Railways Act is subject to the provisions of Section 151 of the Contract Act. It lays down further that it may be true that any precaution taken may not always be successful against the loss in transit on account of theft, but even so evidence should be offered with respect to the extent of precautions taken and with respect to what the Railway Protection Police itself did at the place where the train had stopped. In course of the judgment the Supreme Court points out that it must be taken to be the duty of the Railway Protection Police to get out of the guard's van wherever the train stops, be it at the Railway platform or at any other place.

Here again Mr. Ghosh's difficulty for the Appellant lies in the facts of the case before us. Before the Supreme Court the presence of the Railway Protection Police with the train was an established fact. That is not so in the facts of this case. On the contrary, Ext. N, telegraphic message dated the 19th September, 1953, by the guard Rozario in this case shows that there was no Railway Protection Police on train. That shows at any rate that was not usual or obligatory on the Railway to carry Railway Protection Police in this particular goods train.

The learned Judge at p. 13 of the judgment further observes:

It is, therefore, not a case on the facts here that the Railway failed to provide proper precaution or the place was unguarded by any patrol men or by the guard. A comment has been made here that the strength was not sufficient of these patrol men and that they should have been armed. Now these are matters of comment which on a careful consideration cannot really amount to negligence in the facts of the case. Because the Railway cannot hold the track from Broach to Bombay or from Broach to Shalimar and cannot possibly be expected to know which particular places would require how many patrol men or whether they should be armed or not. To suggest that the entire Railway track of thousand miles in a country like India should be manned and equipped by Armed Patrol Police all along the line is to be unrealistic and is asking for more than a bailee's care or more than the standard of an ordinary prudent man.

64. Whether there has been any negligence or misconduct on the part of the Railway administration or not is a question to be decided on the facts and circumstances of each particular case. It is not desirable or possible to lay down any rigid or inflexible standard except that in each particular case, the Railway administration has to take that much of care as an ordinary prudent man would take under the circumstances of his own goods. The Supreme Court has made the observations already quoted in the peculiar facts of that case and the Supreme Court has not laid down that Railway Protection Police must necessarily

escort the train. The observations of P.B. Mukharji, J. to which I have already referred, aptly points out that it will be an absurd proposition if the entire Railway track of thousand miles in a country like India has to be manned and equipped by Armed Patrol Police.

65. In the instant case I have to consider whether the Railway administration has taken the same amount of care as a prudent owner would have taken of his own goods under the circumstances. Giving the matter my earnest consideration I have come to the conclusion that in the facts and circumstances of this case, the Railway administration had failed to take proper care or the amount of care, as is expected of a prudent owner. It is true that the consignment had been placed in the A.A. Van and the A.A. Van has E.P. locks and is considered safe for carrying valuables; but it is not the case that an A.A. Van cannot be pilfered. The guard is the only person who could keep watch on the A.A. Van. Apart from the guard there were no watchmen or members of the Railway Protection Police or for that matter no other man to keep watch on the A.A. Van. It was not possible for the guard to keep watch on both the sides of the van at the same time. It was known to the Railway administration that there had been frequent thefts in that particular train, yet no arrangements had been made by the administration for any armed escort or member of the Railway Protection Police travelling in the train. It was also known to the Railway administration that bridge No. 88 was under repair and that the train had to halt there and had to move thereafter for sometime at a crawling pace, yet no arrangements had been made to post any watchmen or any armed guards at the place where the train had to halt or at the bridge-site. No prudent owner would have left his goods unattended for any length of time. It is not that an A.A. Van was like a safe deposit vault which could not be pilfered or that the E.P. locks could not be manipulated. It is the case of the Railway administration that the E.P. locks had been removed and the gold consignments had been stolen from the A.A. Van. In my view the Railway administration acted negligently by placing only one man, namely, the guard of the train, to keep watch over the A.A. Van; and the Railway administration had failed to take due care by not keeping adequate members of the Railway Police force or other watchmen sufficient to keep proper vigil or watch on the A.A. Van. In the facts and circumstances of this case I am of the opinion that the Railway administration should have kept armed guards and members of the Railway Police Force both at the A.A. Van and the guard's van adequate not only for the purpose of an effective vigil, but also for preventing any attempted theft or robbery. I am further of the opinion in the facts of this case that it was the duty of the Railway administration to post armed guards or watch men at the place where the train had to halt and at the bridge-site. The administration must have known that at midnight, the parcel train containing valuable article with no armed guards watchmen or members of the Railway Police, would have to halt there and then move for some time at a crawling pace and this could afford an opportunity to burglars, thieves and robbers, yet the Railway administration did not consider it prudent to take necessary safeguard or protection by posting

proper guards or watchmen there. Any prudent person, in my view, Would have taken such necessary precautions, particularly in view of the fact that in the instant case, the parcel train had been carrying precious articles of immense value. Such precautions to my mind are of ordinary prudence and not asking for anything more than a bailee's care.

66. The decision of the Supreme Court in *Union of India v. Udho Ram and Sons* Supra and the unreported decision of the Division Bench of this Court already referred to Supra, lend support, in my opinion, to the view that I have taken. The Supreme Court at p. 423 of the report observes:

It may be true that any precautions taken may not be always successful against the loss in transit on account of theft, but in the present case there is no evidence with respect to the extent of the precautions taken and with respect to what the Railway Protection Police itself did at the place where the train had to stop.

67. P.B. Mukharji, J. delivering the judgment of the Division Bench observed, at p. 13:

It is, therefore, not a case on the facts here that the railway failed to provide proper precautions or the place was unguarded by any patrol men or by the guard.

68. In this case the bridge-site and the place where the train had to halt were completely unguarded and the evidence clearly establishes that no precautions had been taken by the Railway administration to guard the place where the train had to stop or the bridge and the distance which the train could cover at a crawling pace. I, therefore, hold in the facts of this case that there was negligence on the part of the Railway administration and that the Railway authorities did not take the amount of care required of a bailee.

69. Before passing on to the consideration to the next question and while dealing with the question of negligence or misconduct I have to note that there has been sufficient compliance on the part of the Railway administration with the provisions of Section 74-D of the Indian Railways Act in the matter of disclosure as to how the consignment had been dealt with throughout the time. The Railway administration has clearly established that the consignment in question had been loaded into the A.A. Van and that it had remained intact in the A.A. Van when the train had started from Allahabad. The clerk who had loaded the consignment into the A.A. Van has given evidence. The guard who was in charge from Delhi upto Tundla has given evidence. The guard who took over charge at Tundla and remained in charge upto Kanpur has also been examined. Kumar, the guard from Kanpur to Allahabad, has not been examined, but Bhagwandas the guard who took over charge from Kumar at Allahabad has given evidence and has stated that the consignment in question was intact at the A.A. Van when he took over charge at Allahabad. Relevant records have also been produced with regard to loading and the consignment remaining in the A.A. Van upto Allahabad.

70. The only other question that remains to be considered is the question of jurisdiction of this Court. Mr. Mukherjee, Learned Counsel for the Defendant, has submitted that this Court has no jurisdiction to try this suit. According to him this is really a suit against two Railway administrations, namely, the Northern Railway administration and the Eastern Railway administration. He contends that the Plaintiff has no claim against the Eastern Railway administration as the loss had occurred on a territory between Allahabad and Bindhyachal which happens to be under the Northern Railway administration. It is his contention that the claim of the Plaintiff, if any, in respect of the loss, is only against the Northern Railway administration and no part of the cause of action in respect of the Plaintiff's claim against the Northern Railway administration arises within the jurisdiction of this Court; and the Northern Railway administration does not carry on business within the jurisdiction of this Court. Mr. Mukherjee has further contended that non-delivery of the consignment at the destination furnishes no cause of action and the cause of action is the "loss" of the consignment. In support of this contention Mr. Mukherjee has referred to the decision of the Supreme Court in the case of Governor-General in Council now Governor General in Council Vs. Musaddi Lal, . The Supreme Court at p. 727 of the said report observed:

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.

Mr. Mukherjee has also referred to the decision in the case of Union of India(UOI) Vs. Mohammad Yattam Abdul Sattar, . Following the decision of the Supreme Court the Patna High Court has held at p. 487:

The decision of the Supreme Court, mentioned above, states in paragraph 5 that failure to deliver is the consequence of loss or destruction of goods. It does not furnish the cause of action on which a suit may lie distinct from a cause of action for loss or destruction.

Mr. Mukherjee has also drawn my attention to Section 80 of the Indian Railways Act which reads as follows:

Section 80--

Notwithstanding anything in any agreement purporting to limit the liability of the Railway administration with respect to traffic while on the Railway of another administration, a suit for compensation for the loss of the life of, or personal injury to, a passenger, or for loss, destruction or deterioration of animals or goods where the passenger was or the animals or goods were booked through over the Railways of two or more Railway administrations, may be brought either against the Railway administration from which the passenger obtained his pass or purchased his ticket, or to which the animals or 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.

Mr. Mukherjee submits that the proper forum where this suit should have been-instituted was either Delhi where the consignment had been booked, or at the place where it was lost. The substance of Mr. Mukherjee's contention is that this Court has jurisdiction against the Eastern Railway administration, but the Plaintiff has no cause of action against the said administration and this Court has no jurisdiction against the Northern Railway administration against whom the Plaintiff may have the cause of action, if any.

71. Mr. Roy, Learned Counsel for the Plaintiff, has submitted that this Court has jurisdiction to try and entertain this suit. Mr. Roy contends that the claim is against the Defendant Union of India and the liability is the liability of Union of India. It is his contention that though there may be various Railway administrations for the sake of administrative convenience but they are not legal entities and in the eye of law they have no separate existence, except for purposes of notice or otherwise provided by Law. According to Mr. Roy, Union of India as the owner of the Railways in question is the only legal entity against which suit can be instituted. Mr. Roy, therefore, submits that the suit is against Union of India which is the only Defendant in the action and it is not correct that the suit is really against two Railway administrations. Mr. Roy argues that for administrative convenience, separate Railway administrations have been set up and provisions have been made in the Indian Railways Act and also in the CPC with regard to notices to be served on such administrations, but no legal status has been conferred on these administrations and for the purposes of jurisdiction, they cannot be of any consideration. Mr. Roy contends that Section 80 of the Indian Railways Act is merely an enabling section and does not, in any event, affect or curtail the jurisdiction of this Court. In support of his contention that the Defendant is only one and there are no two Defendants, Mr. Roy has referred to two Division Bench decisions of this Court, *Dominion of India v. Jagadish Prosad Pannalal* AIR 1949 Cal. 622 and *M. Bansi v. Governor-General of India in Council* Unreported decision in Ref. No. 2 of 1948, referring the case to the Full Bench.

72. In the case of *Dominion of India v. Jagadish Prosad* AIR 1949 Cal. 622 Harris, C.J. observes at p. 624 as follows:

It is to be observed that learned Advocate for the Petitioner concedes that the proper way of viewing this suit is as a suit against the Governor-General in Council and not as a suit against the Governor-General in Council representing two railways. The Governor-General in Council and now the Dominion of India, does own these two railways. But as owner of the railways, the Governor-General in Council or the Dominion of India is the same entity. It does not own the East Indian Railway in one capacity and the Bengal Nagpur Railway, in another capacity. It owns both and therefore it may well be that upon the true view of the facts in this case, this was a suit against one Defendant and one Defendant only, namely, the Governor-General in Council and now Dominion of India.

73. In the unreported decision in the case of *M. Bansi v. Governor-General of India in Council* Unreported decision in Ref. No. 2 of 1948, the Division Bench

while referring the matter to the Full Bench *Bansi and Others Vs. Governor-General of India in Council*, , observed:

In our view it cannot be said that in the suits in question there were two Defendants, namely, the Governor-General in Council as representing the East Indian Railway and the Governor-General in Council as representing the North-Western Railway. At the material time the Governor-General in Council owned both the Railway undertakings and should have been regarded as one entity. This view is supported by the observations of the learned Chief Justice in *Dominion of India v. Jagadish Prosad* AIR 1949 Cal. 622.

The judgment of the Full Bench is reported *Bansi and Others Vs. Governor-General of India in Council*, and in the said judgment this finding of the Division Bench is also quoted at p. 35 (para. 14) of the said report.

74. Mr. Roy has drawn my attention to Clause 2 of the Parcel Railway Bill No. 433717 issued by the Northern Railway administration which reads as follows:

Clause 2:

For any claim arising on this consignment to be valid it must be submitted in writing to the Chief Commercial Superintendent of the destination Railway within six months from the date of issue of this receipt. Full particulars of booking, viz., station from and to, Railway receipt number, date of booking and route should be specified.

Relying on this particular clause, Mr. Roy contends that even assuming that there were two Defendants, namely, the two Railway administrations, part of the cause of action as mentioned in Clause 2 arises within the jurisdiction of this Court and this Court has, therefore, jurisdiction against the Northern Railway administration also.

75. Mr. Roy has finally argued that in view of the decision of the Supreme Court in the case of *Union of India (UOI) and Another Vs. Ladu Lal Jain*, , this Court has, in any event, jurisdiction to try this suit.

76. The material facts in the case of *Union of India (UOI) and Another Vs. Ladu Lal Jain*, may be briefly noted. The suit was instituted by the Plaintiff-Respondent against the Union of India and the Northern Frontier Railway represented by the General Manager, having its head-quarters at Pandu. It related to a claim for recovery of Rs. 8,250 on account of non-delivery of the goods which had been consigned to the Plaintiff firm running after the name and style of M/s. Ladulal Jain. The consignment consisted of 134 bags of rice and was booked from Kalyangunj station for carriage to Kanki station on the Northern Frontier Railway. The goods consigned Were not delivered and Ladulal Jain, as Plaintiff, filed the suit in the Subordinate Judge's Court at Gauhati within the jurisdiction of which the head-quarters of the said Railway administration was situated. Kalyangunj is in West Bengal and Kanki in the State of Bihar. Gauhati is in the State of Assam. It had been contended that Gauhati Court had no territorial jurisdiction to try the

suit as neither of the aforesaid Railway stations was within the jurisdiction and that the consignment never travelled within any part of the State of Assam and therefore, the cause of action could not arise within the jurisdiction of any Court in Assam. It had been further contended that mere service of notice which was not admitted, on the Defendants at a place within the jurisdiction of the Court, could not vest territorial jurisdiction on it and that Defendant Union of India had no principal place of business at Pandu or any other place within the jurisdiction of the Court, its head-quarters" office being at New Delhi. The Supreme Court held that the Court had jurisdiction inasmuch as the Defendant Union of India carries on business in running Railways and could be sued in that Court as the head-quarters of one of the Railway administrations was situated within the jurisdiction of that Court. The Supreme Court has observed at p. 1683:

Running of railways is a business; That is not denied. Private companies and individuals carried on the; business of running railways prior to the State taking them over. The only question then is whether the running of railways ceases to be a business when they are run by Government. There appears to be no good reason to hold that it is so. It is the nature of the activity which defines its character. Running of railways is such an activity which comes within the expression "business". The fact as to who runs it and with what motive cannot affect it.

And finally in disposing of the case the Supreme Court at p. 1685 of the report observes:

In view of what we have stated above, we hold that the Union of India carries on the business of running railways and can be sued in the Court of the Subordinate Judge of Gauhati within whose territorial jurisdiction the head-quarters of one of the railways run by the Union is situated.

77. Relying on this decision Mr. Roy has argued that Union of India, the Defendant herein, carries on business in running the Railways within the jurisdiction of this Court, as the head-quarters of one of the Railways, namely, the Eastern Railway, is situated within the jurisdiction of this Court. Mr. Roy, therefore, submits that the Court will have jurisdiction, in any event, by virtue of the provisions of Clause 12 of the Letters Patent.

78. Dealing with the arguments of Mr. Roy, Mr. Mukherjee has submitted that the decision in Jagdish Prosad Pannalal's case Supra is no longer good law, as the same has been overruled by the Full Bench in the case of M. Bansi v. Governor-General of India in Council Supra. He has drawn my attention to the following observations of Harries, C.J. at p. 39:

I agree, I desire to add that I am satisfied that the view taken in the case of Dominion of India v. Jagdish Prosad 84 C.L.J. 175, a decision to which I was a party, is erroneous. On further consideration I find myself in entire agreement with the view expressed by my brother Das.

79. Mr. Mukherjee contends that the observation of the Division Bench in the unreported decision in the case of *M. Bansi v. Governor-General of India in Council Supra* relied on by Mr. Roy, are merely obiter and in any event, the same are based on a decision which is no longer good law. He submits that if the observations of the Division Bench in the unreported decision be considered to be any decision on the point, the said decision must be considered to be a decision given per incuriam and should not be followed.

80. In support of the contention that there are really two Defendants and the different Railway administrations are separate legal entities, Mr. Mukherjee has drawn my attention to the decision in the case of *Union of India (UOI) Vs. Durgadutt Poddar and Others*, and he has relied on the following observations of Lahiri, J. at p. 1066:

In the first place it is to be observed that the learned Small Cause Court Judge was not right in holding that the three Railways constituted one entity under the law. The decision upon which he relied for this purpose, namely, the decision of this Court in the case of *Dominion of India v. Jagadish Prosad Pannalal* AIR 1949 Cal. 622 does not really decide that point. In that case Harries, C.J. pointed out that a particular result would follow if it were held that the different Railways in India were owned by the Government of India alone and quite a different result would follow if the Railways be treated as different entities. His Lordship did not actually decide that as a matter of law the different Railways have lost their independent existence as a result of the acquisition by the Central Government of all the different Railways of India. As a matter of fact, such a conclusion is impossible, so long as Section 80 of the Indian Railways Act and Section 80 of the CPC are on the statute book. Section 80 of the Indian Railways Act provides that a suit for compensation for loss, destruction or deterioration of goods may be brought either against the Railway administration to which the goods were delivered by the consignor or against the Railway administration on whose Railway the loss, destruction or deterioration occurred. Section 80 of the CPC provides that "no suit shall be instituted against the Government...until the expiration of two months next after the notice in writing has been delivered or left at the office...in the case of a suit against the Central Government where it relates to a Railway, the General Manager of that Railway." These two sections, in my opinion, definitely contemplate that for the purpose of a suit, the different Railways of India must be treated as separate legal entities and there is no warrant for the proposition that it is sufficient to serve one notice u/s 77 against the Union of India as representing all the Railways.

81. In this connection Mr. Mukherjee has also relied on the decision in the case of *Dominion of India v. Firm Museram Kishun Prosad* AIR 1950 Nag. 85 and also on the decision in the case of *Union of India representing Assam Railway and B.B.C.I. Railway v. Dr. O. Hussain* AIR 1952 Ass 51. With regard to the decision of the Supreme Court in *Union of India v. Ladulal Jain Supra*, Mr. Mukherjee has submitted that if the decision is considered to lay down that Union of India

carries on business in running Railways at the head-quarters, then applying the provisions of Clause 12 of the Letters Patent any suit against Union of India can be filed in this Court on the basis that the Defendant carries, on business within the jurisdiction of this Court and this will lead to absurd results. It is his contention that if such interpretation be given, then in respect of any claim which has nothing to do with the Railways and which may entirely arise in far away and distant places completely outside the jurisdiction of this Court in respect of any other matter concerning the Union, a suit in this Court will be competent in respect of such a claim on the basis that Union of India, the Defendant, carries on business within the jurisdiction of this Court and it is his submission that the decision of the Supreme Court cannot have that effect.

82. In my view the contention of Mr. Mukherjee that there are really two Defendants in this suit, namely, the two Railway administrations, is not correct. Factually as the plaint stands, that is not the position. The only Defendant on record is the Union of India and it cannot be logically contended that two different and separate Defendants remain combined or merged in this one Defendant. Union of India is the owner of the Railways in question and carries on the business of running the said Railways. In view of the magnitude of the business and the vastness of the organization involved in running the business in Railways owned by the Union, separate zones or administrations have been set up for administrative expediency and practical convenience; but Union of India continues to remain the owner of the business. It cannot be said that Union is the owner of one Railway administration in one capacity and of another Railway in a different capacity; as owner of the Railways, Union of India is one and the same entity. If in connection with the carrying on of this business in Railways liability is incurred in any of the administrative units, the liability becomes the liability of Union of India as the owner of the business.

83. This view that I take, is in my opinion, supported by the Division Bench decision of this Court in Jagadish Prosad's case Supra which has already been referred to. In my opinion the view expressed by the Division Bench with regard to this aspect of the matter in Jagadish Prosad's case, has not been doubted or overruled. The observations of Harries, C.J. in the Full Bench decision in Bansi's case Supra to my mind, relate only to the question of notice u/s 77 of the Indian Railways Act and have nothing to do with regard to this aspect of the case. It is to be noted that the only question mooted in the Full Bench Reference in Bansi's case Supra was whether notice u/s 77 of the Indian Railways Act formed a part of the cause of action or not; and the entire decision had centered round that question only. In the referring judgment of the Division Bench (unreported) which I have already noted, the Division Bench on true interpretation of the observations made by Harries, C.J. in, Jagadish Prosad's case Supra, had held that there was only one Defendant viz., the Governor-General in Council and the learned Judges of the Small Cause Court were wrong in presuming that there were two Defendants representing the two Railway administrations. This finding of the referring Bench had been recorded in the Full Bench decision Supra, at p.

35. (para. 14 of the report) without any disapproval. In these circumstances I am unable to accept the contention of Mr. Mukherjee that the views expressed by Harries, C.J. in Jagadish Prosad Pannalal's case Supra, on this aspect have been overruled; and I cannot also accept his contention that the observations made by the Division Bench in Bansi's case Supra (unreported) referring the case to the Full Bench, were only obiter or that that decision given in that case was a decision given per incuriam. In my view, the judgment of the Division Bench in Bansi's case (unreported) Supra referring the matter to the Full Bench, remains binding on this Court.

84. The observations of Lahiri, J. in Union of India v. Durgadutt Podder Supra relied on by Mr. Mukherjee, are in my view, clearly distinguishable, as the said observations had been made in relation to the question of service of notice u/s 77 of the Indian Railways Act. It is to be noted that the decision of the Division Bench (unreported) in Bansi's case Supra in which the observations of Harries, C.J. in Jagadish Prosad Pannalal's case Supra had been construed, was not cited before Lahiri, J. and was not considered by him. The said decisions of the Division Bench are binding on this Court and if the observations of Lahiri, J. intend to suggest anything to the contrary, the same cannot be followed.

85. The fact that the existence of these Railway administrations owned and run by the Union of India is recognised for the purpose of notice or otherwise by the CPC and the Indian Railways Act, does not, in my view, make them separate legal entities for the purpose of any suit for adjudication of any liability. Notices u/s 80 of the CPC and u/s 77 of the Indian Railways Act may be conditions precedent to the foisting of any liability or for enforcement thereof in any suit; but they form no part of the cause of action and are not germane to the question of jurisdiction or the party to the action. In view of the nature of the Defendant and the vastness of the organisation, such notices are provided for, as a matter of practical expediency, to enable the Defendant to deal with all such claims effectively, before any suits may be filed, to prevent avoidable litigation. Taking into consideration the factual existence of diverse administrations, provisions have been accordingly made for service of these notices in the manner which will best serve the purpose. These are particular requirements of law to be complied with before the institution of any suit. These provisions relating to notices in a specified manner have been introduced not only in the interest of administrative expediency but also in the larger interests of the citizens, to enable the Union of India to deal with their claims effectively. In view of the nature of the organization, if such notices are not addressed to the proper authorities, the very purpose of serving such notices may become frustrated. These requirements of law relating to notices u/s 80 of the CPC or u/s 77 of the Indian Railways Act, for administrative and practical expediency, in my view, cannot make these administrations separate legal entities for the purpose of any suit or for the purpose of adjudication of liability or jurisdiction.

86. I am inclined to agree with the contention of Mr. Roy that Section 80 of the

Indian Railways Act is not a prohibitive but an enabling section which enables the person aggrieved to proceed in accordance with the provisions of the said section, notwithstanding anything contained in the agreement purporting to limit the liability. The said section confers a right of which the party might have been deprived as a result of any agreement. The said section, in my view, does not affect the law relating to jurisdiction of Courts. It may be noted that Section 80 of the Indian Railways Act had been on the statute book when there were various Railway administrations owned and managed by different bodies which happened to be distinct and separate legal entities and were altogether different persons in the eyes of law. The scheme of the Railways Act was intended to cover not only Railways owned and managed by the Government but also the other Railways like Company Railways and District Board Railways. In view of this fact Section 80 of the Indian Railways Act had a very important role to play in the determination of the liability of any particular Railway administration. With the change in the position and with Union of India becoming the owner of the Railways in India, Section 80 of the Indian Railways Act may have lost a good deal of its importance. The fact that Section 80 of the Indian Railways Act might have lost its importance or usefulness is, in my view, no consideration for holding that the various Railway administrations owned and managed by the Union are separate legal entities.

87. A Full Bench of the Assam High Court in the case of Chandra Mohan Saha v. Union of India AIR 1953 Ass 193, while dealing with Section 80 of the Indian Railways Act observed at p, 194:

The section evidently contemplates that for the loss, destruction or deterioration of goods, a suit may be brought against the railway administration to which the goods were consigned, or alternatively against the railway administration on which the loss occurred. The words "railway administration" have not been defined in the section itself and therefore, one has to look beyond the four corners of the section to find out what this expression means. It must be, however, conceded that there railway administrations, namely, the railway administrations to which the goods were consigned, or the railway administrations on which the loss occurred, are treated as different units and separate and distinct entities. But this is only so with the object of ascertaining the liability of the Administration or Administrations concerned as the goods may travel over various railways. The distinction acquires special significance where these railway administrations are owned by different bodies and not by the same owner. "Railway administration" has been defined in Section 3(6) of the Act. It says:

"railway administration" or "administration" in the case of a railway administered by the Government or a State means the Manager of the railway and includes the Government or State.

Therefore, in a case where the railway is administered by a Government or State, a suit u/s 80 of the Act can be brought against the Government or the State

concerned. Thus, where the railway administration to which the goods were consigned and the railway administration on which the loss occurred were both owned by the same Government or State, it follows from the language of Section 3(6) that a suit can be brought against the State or Government which owns both the railways. But the plaint must, on the face of it, state the cause of action as to how and in what capacity the State is sought to be made liable whether as owner of the railway to which the goods were consigned, or as owner of the railway on which the loss occurred, or both.

88. The cases of *Union of India representing Assam Railway and B.B.C.I. Railway v. Dr. O. Hussain Supra*, *Dominion of India v. Firm Museram Kishun Prosad Supra* relied on by Mr. Mukherjee were also discussed and considered in this Full Bench decision and dealing with these cases, the Full Bench observed at p. 197 (para. 16):

The decision "A.I.R. 1950 Nag. 85 (B)", which was followed by this Court in "A.I.R. 1952 Ass 51 (A)", now needs to be examined in the light of the principles discussed above. I may say at the outset that these decisions are justifiable on their own facts. In the Nagpur case, certain goods were consigned from Rajahmundry Station on the M.S.M. Railway to be delivered at Howbagh Station on the B.N. Railway. When the wagon containing the goods was received at Howbagh some of the goods were found missing. On these allegations, the Plaintiff, after serving a notice upon the Secretary to the Central Government Commerce and Railway Department, instituted a suit for recovery of damage. The defence was that the loss did not occur on the B.N. Ry. It was also contended that no notice had been served upon the M.S.M. Railway, to which the goods were consigned, nor was that railway made a party to the suit. It had not been proved that the loss occurred on the B.N. Railway. Indeed the finding was that there was no, proof of any loss at all. On these facts, the suit had to be dismissed. There are, however, some general observations made in the judgment which have encouraged the argument that the Railway administration, as such, should have been made a party to the suit. I have already said that for certain purposes the Railway administrations are to be treated as separate entities with separate existence and personalities; but if their Lordships proposed to lay down that the railway administration, as such, through its Manager, should have been made a party Defendant to the suit, although the Government, as owner of the railway, was a party, then I may respectfully point out that the observation is not only obiter but against the correct view of the law propounded in the earlier part of this judgment. It would not be correct to say that suing the Governor-General as representing" entire State-owned railways was not a proper form of suit because that would render Section 80, CPC otiose and meaningless. On the contrary, as I have explained, Section 80 has to be read in the light of the definition of "railway administration" as given in Section 3(6), Railways Act and in the case of State-owned railways, it would not be right to hold that suit against a railway administration would include Government, but not "vice versa".

89. In this connexion I may also refer to the decision of the Madras High Court in the case of P.R. Narayanaswami Iyer v. Union of India (sic), which, in my opinion, supports the view that I have taken. In this case the Madras High Court has discussed Section 80 of the Indian Railways Act and has also given a brief account of the history of the different Railway systems in India and how most of the system came to be ultimately owned and managed by the Government. The Madras High Court at pp. 60-61 (paras. 15-17 of the report) observed as follows:

In this connection, we may also notice another argument of Mr. Rajah Aiyar. He stresses the fact that Section 80 of the Railways Act was retained in the statute, despite most of the railways having become Government-managed by 1948. He also pointed to the amendment of Section 80, Code of Civil Procedure, in 1948 by Act 6 of 1948. The purport of this amendment was to introduce a new clause in that section relating to notice to Government for suits concerning railways owned and run by the Government. In the section as it stood before amendment, in the case of a suit against the Central Government, a notice to the Secretary of that Government was sufficient. But, after the amendment, Clause (b) of Section 80 provided that, in the case of a suit against the Central Government, where the suit relates to a railway, notice was necessary to the General Manager of that Railway. The contention pressed upon us was that, if the different railway systems managed by the Government were not distinct legal entities, notice to the General Manager of the different railway systems would not have been insisted upon by the amending Act.

In our opinion, neither considerations of the person to whom notice is directed to be given in the case of a suit against the Central Government in relation to its management of railways, nor the provisions of Section 80 of the Railways Act could govern the scope and application of Section 77 of the Railways Act. It is well-known that statutory notices to Government found in various enactments are only matters of procedure and are not matters of substantive rights. True, failure to give such notice might result in the suit being dismissed but that does not alter the situation. In its essence, notice of a claim or of a suit to the Government is only a provision, the purpose of which is to prevent vexatious suits against Government and also to facilitate composition of just claims made by parties against the Government, resulting in avoidance of unnecessary litigation against Government.

Such a provision in any Act cannot be construed as limiting or governing the substantive rights of parties like the citizens of the country who deal with railways managed by the Government. The liability of the Government arising by reason of its owning and managing the railway systems of the country is a liability arising under statute law relating to contracts. True, this liability is in some instance limited and regulated by the Railways Act; but, that is entirely different from saying that the liability owes its origin to the Railways Act. Section 79, CPC contains the provision regulating suits against Government. It provides that, in a suit by or against the Government, the authority to be named as

Plaintiff or Defendant shall be, in the case of a suit by or against the Central Government, the Union of India.

It will be seen that this provision makes no distinction between the various activities of the Union Government, some of which are commercial and the rest are governmental in the strict sense of that term. The Central Government may incur liability, for which a suit may be laid against it either in its commercial activity or in its other activities. The form of the suit laid against the Central Government in either case is the same. To contend that, in its railway activity, the Central Government has created separate legal entities like the different railway systems called the Southern Railway, the Western Railway etc., one finds no authority either in the CPC or in the Railways Act.

In Chapter 7 of the Railways Act, which deals with the responsibilities of railway administration as carries, the term used, wherever the measure of liability has to be fixed, is "railway administration". The same term is found used in Sections 77 and 80 of the Railways Act also. The definition of this term in the Railways Act includes, in the case of a railway administered by the Government, the Government itself. But in the case of a railway administered by a railway company, this term means the railway company, of course, this definition also provides that, in the case of a railway administered by the Government, the term "railway administration" shall mean the Manager of the railway.

But, from this alone, one cannot conclude that railway administrations as such have a separate legal existence in the eye of the law as persons having juristic personality capable of being sued for a liability incurred by the Central Government. In many places in the Indian Railways Act, responsibilities and duties are cast upon the Manager of the railways and certain functions are also allotted to such Managers. In the case of railways managed by Government, such duties and responsibilities have to be undertaken only by the Manager of the railway as an authority nominated under the Railways Act.

In such cases, it was necessary to make a distinction between the owner of the railways, namely, the Central Government and the authority actually running the railway upon whom duties have been cast by the Railways Act. Thus, the definition of (sic) administration" with reference to a Government railway had to (sic) for indicating not only the Government, but also the Manager of the railways. That is the real explanation for this definition in relation to Government railways. From this, it cannot be inferred that either the Managers of the different Government railway systems or the different zonal units of the Government railway systems were intended to be separate legal entities capable of being used, apart from the Central Government.

If regard is had to the language of Section 79, Code of Civil Procedure, it would be obvious that a suit would be laid against the Central Government without pleading the Manager of a railway belonging to the Central Government either as a party Defendant or as the officer who should represent the Government in that

suit. In many of the decisions cited before us, suits were laid against the Union of India representing a particular railway owned by it. This feature has been emphasised in some of the decisions as though it meant that the principal Defendant was the railway system and the Government of India represented that system. In our opinion the reverse ought to be the correct position. Section 80, CPC was amended in 1948, when different railway companies were running the railways owned by the Government and in the eye of the law, they were the persons responsible to the public who dealt with them. Amalgamation was effected only in 1951 and this is one additional reason why the amending of Section 80, CPC could not have any effect upon the question as to who is liable to answer a claim arising after 1948, with reference to a railway system owned and run by the Central Government.

The provisions of Section 80 of the Railways Act were sought to be interpreted by Mr. Rajah Aiyar, on the basis that the Central Government in relation to one railway system run by it, is different from the same Government in relation to another railway system run by it. Just as we have pointed out that the question of notice u/s 80, CPC has no bearing on the liability of the Central Government in relation to the railways run by it, similarly, the provision in Section 80 of Railways Act has no relation to the frame of the suit, which has got to be filed against the party liable to a citizen dealing with the railways in the country. Section 80 of the Railways Act was intended to provide for the liability of different railway systems in connection with what is called "through traffic".

In 1890, when this section was enacted, different railways in the country were owned by different railway companies and administered by them. Traffic passing through the railway of one or more of such different railway companies gave rise to claims for compensation. The contracting railway, wherein the traffic originated, was in the habit of inserting clauses in the agreement called Risk notes limiting its liability when loss or destruction of the goods took place in another railway, through which through-traffic had to pass. Difference in judicial opinion arose as to the liability of the respective railways over which the traffic passed and the necessity for giving notice to all these railways u/s 77 of the Act. Differences of opinion also arose as to whether the contracting railway was the principal and the delivery-railway, its agent.

In some cases, the opinion was also expressed that there was something like a partnership between the railways constituting the route through which the goods had to pass. In order to set at rest this conflict, the legislature enacted Section 80 of the Railways Act. The purpose of the enactment was to simplify the law as to liability and to indicate clearly the persons who could be sued for that liability. It provides that the owner of the goods lost or destroyed in the case of through-traffic could sue either the contracting railway or the railway over which the loss or destruction of the goods had occurred. This provision was an overriding provision because the section says that this would be the remedy open to the person dealing with railways notwithstanding any clause in the contract which

was entered into with the originating railway. That this provision was retained even after 1948 when all the major railway systems of the country came to be owned and run by the Government is the main plank in the argument of Mr. Rajah Aiyar. According to him, it follows from this that though the six zonal railways of the Government may not be separate juristic entities in the eye of the law, they were treated for the purpose of the Railways Act and claims of the public dealing with those railways, as separate entities. In our opinion, this inference does not follow, because even after 1948, a few railway systems are still working in this country which are not owned by the Government and are also not run by the Government.

These are District Board and company railways. Though they may be very few in number, their existence accounts for the continued retention of Section 80 in the Railways Act, because even now, it is quite where such traffic is carried not only over Government run railways, necessary to provide for liability in the X case of "through-traffic, but also over what we would call private railways. Section 80 which was intended to deal with liability of the railway system for through-traffic could yield a workable result only if different railway systems are treated as units according to ownership. It may be open to the Government to convert their different zonal systems into corporations or juristic entities, when alone the argument of Mr. Rajah Aiyar would have any point.

The provisions of the Railways Act do not contain any indication that this was attempted or effectuated, though for the purposes of supervision and control of the opening and running of the railways in the interests of the public, the Act treated each railway system including Government railways as a separate unit. We are here concerned only with legal liability which can be determined only with reference to juristic entity, and in the case of all railways owned by the Government, they fall under one ownership, and for the purpose of legal liability, they must be treated as one person.

90. There is another aspect of the matter, the consideration of which leads me also to the same conclusion, namely, Union of India is the only Defendant in the suit and there are no two Defendants representing the two Railway administrations. Any decree that may be passed against Union of India in respect of any claim against any Railway administration or administrations owned and managed by the Central Government, is executable if the occasion arises, against any assets of the Union of India and is not limited to the assets of the administration or administrations concerned. It cannot be contended that such decrees can be executed only against the particular administration or administrations. If the various Railway administrations owned and managed by the Union of India, were separate legal entities and were the real Defendants, a decree in that case, could only be executed against the said administration or administrations and not against any other assets or properties of the Union. In any event, the findings of Harries, C.J. in the Division Bench judgment in Jagadish Prosad Pannalal's case Supra and the decision of the Division Bench in

Bansi's case Supra which I have already noted and discussed, remain, in my view, binding on this Court.

91. I, therefore, hold that Union of India is the only one Defendant in this suit and there are no two Defendants, real or otherwise, in this action. In my view, the various Railway administrations owned and managed by the Central Government, are not separate legal entities for the purpose of any suit, in so far as jurisdiction and liability are concerned.

92. The Supreme Court in the case of Ladulal Jain Supra clearly holds that Union of India carries on the business of running Railways. The Supreme Court further holds:

Union of India can be sued in the Court...within whose territorial jurisdiction the head-quarters of one of the railways run by the Union is situated.

In my view, the effect of the decision of the Supreme Court is, that Union of India carries on business of running Railways at the headquarters for the purpose of jurisdiction. In the instant case the " head-quarters of one of the Railways, namely, the Eastern Railway, is within the jurisdiction of this Court and I must, therefore, uphold the contention of Mr. Roy and hold that this Court has jurisdiction to try and entertain this suit. This conclusion inevitably follows from the provisions of Clause 12 of the Letters Patent which lays down that this Court:

shall be empowered to receive, try and determine suits of every description, if, in the case of suits for land or other immovable property, such land or property shall be situated or in all other cases if the cause of action shall have arisen either wholly or in case the leave of the Court shall have been first obtained, in part within the local limits of the ordinary original jurisdiction of the said High Court, or if the Defendant at the time of the commencement of the suit shall dwell or carry on business or personally work for gain within such limits; except that the said High Court shall not have original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Calcutta, in which the debt or damage or value of the property sued for does not exceed Rs. 100.

93. To my mind the observations of the Supreme Court "within whose territorial jurisdiction the head-quarters of one of the Railways run by the Union is situated" in the case of Union of India v. Ladulal Jain Supra, support this conclusion. It is to be noted that although the head-quarters of the particular Railway over which the goods were carried was situated at Gauhati, the Supreme Court has chosen to observe: "the head-quarters of one of the Railways run by the Union is situated" and in my view, the Supreme Court has advisedly made such observation, as the various Railways run by the Union are not separate legal entities and Union which carries on the business of running the Railways at the head-quarters is liable to be sued at any such place where any such head-quarters is situate.

94. The contention of Mr. Mukherjee that this view of the legal position will

permit all kinds of suits against the Union in whatever connection the claim may arise and wherever the cause of action may lie, to be instituted in this Court, is fallacious and not tenable. It is to be borne in mind that Union of India is the generic name in which suits by or against the Central Government have to be instituted. The Central Government carries on and is required to carry on multifarious activities in various spheres. One of the numerous activities of the Union is to run the business of Railways; and the various other activities in different spheres have nothing to do with the business of Railways and have no concern whatsoever with the Railways or the business of running the Railways. In view of the peculiar nature and character of the Union of India, jurisdiction on the basis of the Union carrying on business of the Railways can be invoked, in my view, only in cases of claims and causes of action relating to Railways and the business of running the Railways only and in no other cases. In my view it is not the position and it cannot be the position, that the jurisdiction of this Court can be invoked to entertain suits against the Union in respect of claims of every description, not in any way connected with or relating to the Railways owned and managed by the Union, on the basis that the Union carries on business of running the Railways within the jurisdiction of this Court. It may, however, be that in view of this position a suit is liable to be instituted in this Court against the Union of India in respect of any claim against any of the Railway administrations owned and managed by the Central Government, although no part of the cause of action may arise within the jurisdiction of this Court. But, in my opinion, there is nothing unusual or absurd about such a position. If a person X carries on business under three different names A, B and C within the jurisdictions of the High Courts at Madras, Bombay and Calcutta respectively and if another person Y has any claim against X in respect of his business B at Bombay, Y is at liberty to file a suit against X in this Court on the basis that X carries on business within the jurisdiction of this Court and the suit would be perfectly competent in this Court. I see no reason why there should be any difference in the matter of any suit against the Union in respect of any claim against any of the Railways owned and managed by the Central Government.

95. In any event in the facts of the present case I agree with the contention of Mr. Roy that because of the provisions in Clause 2 in P.W. Bill No. 433717 issued by the Northern Railway administration, part of the cause of action even against the said administration arises within the jurisdiction of this Court.

96. I, therefore, hold that this Court has jurisdiction to try and entertain this suit.

97. Accordingly, I have to answer the issues in the manner following:

Issue No. 1 : Yes--The value of the gold was Rs. 62,000.

Issue No. 2 : Yes--The Plaintiff did not agree to pay the same.

Issue No. 3(a) : Yes.

Issue No. 3(b) : No.

Issue No. 4 : Yes.

Issue No. 5 : No.

Issue No. 6 : Yes, it may be noted that this issue was not pressed on behalf of the Defendant.

Issue No. 7 : Yes, it may be noted that this issue also was not pressed on behalf of the Defendant.

Issue No. 8 : Yes.

Issue No 9 : The Plaintiff is not entitled to any relief.

98. This suit, therefore, fails and is hereby dismissed. In the facts of this case and taking into consideration that the Plaintiff has lost gold worth Rs. 62,000 due to default and negligence on the part of the Defendant I do not make any order as to costs in favour of the Defendant and I direct that each party shall pay and bear its Own costs of the suit.

99. After this judgment had been made ready and before the same had been delivered, Mr. Mukherjee, Learned Counsel for the Defendant, mentioned to me that Ray, J. had delivered a judgment in which a similar question of jurisdiction has been considered. I had postponed delivery of this judgment to enable me to consider the judgment of Ray, J. The judgment of Ray, J. in the suit of Jagannath Chetram v. Union of India Unreported decision of Ray, J. in Suit No. 238 of 1964 delivered on March 14, 1966, has since been made available to me and I have had the benefit of considering the same. It unfortunately appears that the opinion expressed by the learned Judge is not quite in accord with the view taken by me. The unreported decision of the Division Bench of this Court in Bansi's case Supra referring the matter to the Full Bench was not cited before the learned Judge and has not been considered by him. I have given the matter very anxious and further consideration, particularly having regard to the views expressed by Ray, J. I, however, cannot persuade myself to change my mind. The Division Bench decision (unreported) in Bansi's case Supra, which has been referred to in the Full Bench decision in Bansi's case Supra without any disapproval remains in my opinion, binding on this Court.

100. It is further to be borne in mind that in this case there is no dispute that due notices u/s 80 of the CPC and u/s 77 of the Indian Railways Act had been duly served on both the Railway administrations. In any event in the facts of this case, I choose to adhere to the view that I have already expressed.