

(2012) 10 GUJ CK 0058
In the Gujarat High Court
Case No : Second Appeal No. 9 of 1989

Jagnath Marble and Mosaic Tiles

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 29-10-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Evidence Act, 1872 — Section 106

Citation : (2013) 1 GLR 438

Hon'ble Judges : C.L. Soni, J

Bench : Single Bench

Advocate : Mehul S. Shah with Suresh M. Shah, for the Appellant; Megha Jani, Shantilal S. Shah, Kalpesh N. Shastri with Ms. Reeta Chandarana, for the Respondent

Judgement

C.L. Soni, J.—This appeal under Sec. 100 of the CPC is filed by the original plaintiff who had preferred Regular Civil Suit No. 452 of 1982 against the present respondent (hereinafter called as "the Railway" for convenience) seeking recovery of Rs. 9,291-84 paise. The case of the plaintiff in its suit is that the plaintiff booked consignment of polished stones with the Railway for transit through Railway for Rajkot Junction under Invoice No. I.R.R. 161859 dated 10-10-1980. Out of the total number of 562 stones, 226 stones were delivered to the plaintiff in damaged condition and damage to the extent of 40% was certified by the L.O.W. Rajkot in presence of two independent panchas. Therefore, notice was served by the plaintiff to the Railway on 13-2-1981 claiming damage from the Railway but the Railway refused to make any payment and gave vague reply.

2. Particulars as regards claim for damage are given by the plaintiff in Para 2 of the plaint. The plaintiff has stated that the cause of action for the suit had arisen on or about 15-11-1980 when the delivery of the stones was given to the plaintiff in damaged condition due to negligence, carelessness and misconduct on the part of the respondent-administration.

3. The suit of the plaintiff was resisted by the Railway by filing written statement at Exh. 13 and it was stated that the consignment of the plaintiff was booked at owner's risk basis as per the request of the plaintiff. When the goods were loaded, inner condition of the goods were not known to the Railway. The plaintiff had not complied with the proper packing condition as per the rules. The plaintiff had not complied with the Railway Rules. Consignment left the booking station on 10-10-1980 in wagon No. 102844 and arrived at the destination in the same wagon on 26-10-1980. It is further stated that the alleged damage to the goods was due to inherent vice and bad quality of the goods loaded by the consignee and the goods were fragile in nature. The consignment was booked at owner's risk and the Railway could not be made responsible for any damage caused to such goods. The plaintiff was called upon to prove the actual damage caused to the goods. Actual damage is not proved and the plaintiff is not entitled to the loss claimed in the suit at the market value.

4. On the basis of the above pleadings, trial Court framed following main issues:

(1) Whether the plaintiff proves that the damage caused to the suit goods is due to carelessness, negligence and misconduct of the Railway?

(2) Whether the plaintiff is entitled to recover any amount from the defendants? If yes, what amount?

5. The plaintiff examined one Shri Narendra Sundarji at Exh. 22 as its witness who also happened to be the partner of the plaintiff. Said witness has stated that the consignment was comprising of black stones. When the delivery was given, certain stones were found broken, delivery panchnama was reduced into writing and the same is exhibited at Exh. 16 wherein it is clearly mentioned that 226 stones were broken. That the damage was calculated at the rate of 40%. Said panchnama was drawn by the Railway authority.

5.1. The Railway examined one witness at Exh. 37 who was Senior goods clerk. He produced on record Railway receipt at Exh. 19 and forwarding note at Exh. 20 and stated that he had no knowledge about the position of consignment at the time of loading but the consignment was loaded in open wagon at the owner's risk. Railway receipt was signed by him and the consignor had not objected about the notes written in the Railway receipt. He further stated that no packing material was used by the consignor. He further stated that such type of stones were placed in the closed wagon as also in the open wagon as per the choice of the consignor. The plaintiff sent its consignment in the open wagon. He has also stated that the forwarding note was executed after accepting the consignment.

6. On the basis of the evidence available on record, the learned trial Judge found that when the delivery was given to the plaintiff, 226 stones were found damaged. It is also found that the plaintiff had used grass and the goods were loaded in packed condition in the open wagon and such grass packing was used by the plaintiff as per the rules of the Railway which was found when the consignment reached to the destination. The learned trial Judge also observed

that the consignment was booked on 10-10-1980 and reached to the destination at Rajkot on 26-10-1980 which was after a period of 16 days. The learned trial Judge further observed that the distance was 250 km. and for covering such distance, six to seven days were required but to reach to the destination, the wagon took sixteen days, and thus, there was delay of nine more days in reaching to the destination. Thus, the Railway was responsible for damage caused to the goods of the plaintiff because of such delay and the Railway could not prove that the delay was without negligence or misconduct on its part. The learned trial Judge also considered the provisions of Secs. 73 to 76 of the Railways Act, 1890, and ultimately, came to the conclusion that the plaintiff had suffered damage due to negligence and carelessness on the part of the Railway, and therefore, the plaintiff is entitled to recover the damage. Value of the damage was assessed at Rs. 4,975-30 ps. And the learned trial Judge also found that the plaintiff was entitled to Rs. 4,286-54 being the proportionate freight charges + Rs. 30/- towards the notice charges. Ultimately, the learned trial Judge held the plaintiff entitled to Rs. 9,291-84 ps. from the Railway and passed the decree for the said amount with interest at the rate of 6% p.a. from the date of the suit till the same is realised from the Railway.

7. Aggrieved by the judgment and decree of the trial Court, the Railway preferred Civil Appeal No. 135 of 1993. Before the appellate Court, the Railway mainly contended that the Railway would not be responsible for the damage caused to the plaintiff because the plaintiff had booked its consignment at the owner's risk and decided to carry the consignment in open wagon at lesser rate. The Railway contended that by virtue of the provisions of Secs. 73 and 74, the responsibility of the Railway would not arise for any damage caused to the goods of the plaintiff. It was also contended that there was no negligence or carelessness on the part of the Railway for delay in transit of the consignment to its destination and the plaintiff having failed to prove any negligence on the part of the Railway, for delay in reaching such consignment to the destination, the plaintiff was not entitled to any damage as claimed by the plaintiff.

8. The learned appellate Judge came to the conclusion that the consignment was booked at the owner's risk, and it was the plaintiff who decided to have such consignment through open wagon, therefore, the plaintiff could not make any claim about damage. The learned appellate Judge also came to the conclusion that there is no plea in the plaint that the damage was caused to the goods because of the delay on the part of the defendants. The learned appellate Judge, thus, found that the plaintiff has failed to establish that damage was caused due to negligence and carelessness on the part of the Railway Administration. The learned appellate Judge further came to the conclusion that the damage claimed was not according to the value of the goods and the bill which was produced was of the value of Rs. 14,250/- and the freight charges were Rs. 9,291/-, therefore, total was Rs. 23,471/- from which the learned appellate Judge arrived at the value of Rs. 14.67 per stone and came to the conclusion that the damage to the extent of 40% would come to Rs. 3,707-60. The learned appellate Judge

recorded that even if the plaintiff was entitled, he would be entitled to the aforesaid amount of damage. On the basis of the aforesaid conclusions, the learned appellate Judge allowed the appeal and quashed and set aside the judgment and decree passed by the learned trial Judge. It is this judgment and decree passed by the learned appellate Judge which is under challenge in this second appeal.

9. This appeal was admitted by order dated 19-3-1991 while formulating the following substantial question of law:

(1) What is the meaning "consignor's risk" occurring in Sec. 74 of the Railways Act, 1899 ("the Act" for brief)

(2) Does Sec. 74 of the Act exclude the operation of Sec. 106 of the Evidence Act, 1872?

10. I have heard the learned Advocates for the parties. Learned Advocate Shri Shah appearing for the appellant submitted that the learned appellate Judge has committed grave error in interfering with the judgment and decree passed by the learned trial Judge on the reasonings which were not germane in deciding the issues involved in the appeal. He submitted that there is no dispute about the fact that there was delay of nine days in delivering the goods to the plaintiff. He submitted that though the consignment was booked at the owner's risk and though the consignment was placed in open wagon as per the wish of the consignor, still, the Railway would not be absolved from its responsibility to take care of such consignment and initial onus was on the Railway to prove that proper care was taken during the period of transit especially during the delayed period of nine days which was a period beyond the requisite days during which the consignment was to reach and such initial burden was on the Railway to prove that there was no negligence or carelessness on the part of the Railway Administration for delay and only on such initial proof being given by the Railway, burden was to shift to the plaintiff to positively prove the negligence or misconduct on the part of the Railway. Learned Advocate Mr. Shah submitted that the case of the appellant would be governed by the provisions of Sec. 76 which requires Railway to initially prove that there was no misconduct or negligence on the part of the Railway for delay, and therefore, in view of the undisputed position that there was delay in delivering the goods and that the goods delivered were found in damaged condition, the plaintiff was straightaway entitled to the claim of damage put forth by the plaintiff in the suit. Learned Advocate Mr. Shah submitted that the witness examined by the Railway has in fact stated that the condition of consignment when loaded was not known and the Railway receipt issued by the Railway did not mention that the consignment was in damaged condition. He also submitted that the officer of the Railway has also not established that the proper care was taken by the Railway during the transit period especially during the delayed period of nine days of transit. Learned Advocate Mr. Shah submitted that it was for the Railway to point out and establish as to how and in what manner the consignment remained with the

Railway during the delayed period of transit and in absence of such particulars, and since the goods although out remained in the custody of the Railway till the same was delivered, the presumption would be that the goods suffered damage because of the negligence on the part of the Railway. Learned Advocate Mr. Shah submitted that since the Railway has failed to prove the above said aspect of the matter, there was no burden on the plaintiff then to positively prove that the goods suffered damage because of the negligence or misconduct on the part of the Railway. Even in absence of such proof from the side of the plaintiff, when the goods were found to have been delivered in damaged condition, the claim of the plaintiff could not have been defeated simply on the ground that details about delay are not provided in the plaint. Learned Advocate Mr. Shah also submitted that the learned appellate Judge has also committed error in misinterpreting the provisions of Secs. 74 and 76 of the Act and has committed serious error in denying the claim of the plaintiff by allowing the appeal of the Railway. In support of his submissions, learned Advocate Mr. Shah has relied on the following decisions:

- (1) Hundraj Chhangomal and Co. Vs. Union of India (UOI),
- (2) Union of India v. M/s. Tolaram Hariram, 1979 (2) GLR 371
- (3) Union of India (UOI) Vs. Brijlal Purshottamdas,

11. In reply, learned Advocate Ms. Reeta Chandarana for the Railway has submitted that the consignment was at the owner's risk and in order to get the benefit of reduced rate of freight, the plaintiff had decided to have his consignment placed in open wagon, therefore, even if the plaintiff had suffered any damage to the goods, such plaintiff at whose risk the consignment was to be transited was not entitled to claim any damage from the Railway. She submitted that the Railway has by evidence of witness as also by documentary evidence on record, discharged its burden of proving that the delay in transit of consignment was not because of any negligence, misconduct or carelessness on the part of the Railway. She submitted that the witness has given details about the transit of consignment from one stage to the another stage and during the entire period of transit, there was no negligence or misconduct by any of the officers of the Railway. She further submitted that what is required by Sec. 76 is to discharge the initial burden by the Railway on the aspect of negligence or misconduct causing the delay for delivering the goods of consignee and not about the handling of the consignment by the Railway during such transit. She submitted that the Railway has by oral as also by documentary evidence, proved that the wagon travelled from one stage to another in its normal course and even during the delayed period of 9 days, there was no negligence or carelessness on the part of the Railway for the purpose of transit of Railway wagons from initial stage to the stage of destination. Such was the only requirement as per Sec. 76 which the Railway had successfully satisfied by its evidence before the Court and then, it was for the plaintiff to positively prove the negligence or misconduct for delay because of which the plaintiff had suffered damage to its goods. She submitted

that the plaintiff has not given any such evidence about any carelessness, negligence or misconduct of any of the servants of the Railway during the transit period. She submitted that in fact, such is not even the case of the plaintiff in the plaint. No claim is made about the carelessness or negligence causing delay in delivering the goods. She submitted that in absence of such plea in the plaint, it is not permissible to consider the claim of the plaintiff on such ground of delay. She, therefore, submitted that in fact, the plaintiff would not be entitled to claim of damages by placing reliance on Sec. 76 of the Act. She submitted that in fact, Sec. 74 of the Act would be applicable to the case of the plaintiff. She submitted that simple case of the plaintiff in the suit is that when delivery of the consignment was received, 226 stones were found damaged, and therefore, the plaintiff was entitled to claim the damage from the Railway. She submitted that as per Sec. 74 of the Act, when the consignment was booked at the owner's risk, at the reduced rate, the Railway Administration shall not be responsible for any loss, destruction or deterioration to the goods of the appellant for any cause whatsoever except upon the proof that such loss, destruction, damage or deterioration was due to negligence or misconduct on the part of the Railway or its servants. From the above provisions, she pointed out that unless the plaintiff had successfully proved by cogent evidence that the damage suffered by the plaintiff was due to negligence, misconduct or carelessness on the part of the Railway or its servants, the Railway could not be made responsible for such damages suffered by the plaintiff. She, therefore, submitted that the present is a case governed by Sec. 74 of the Act and not by Sec. 76 of the Act. She, however, alternatively, submitted that even if the case is taken to be governed by Sec. 76 of the Act, then also, the Railway has already discharged its burden by establishing that the Railway was not negligent for delay, therefore, the plaintiff could not be held entitled to any damages simply on the ground of such delay. She further submitted that, even otherwise also, the plaintiff was to prove the actual damage suffered by the plaintiff which the plaintiff miserably failed to prove, and therefore, the learned appellate Judge has rightly interfered with the judgment and decree passed by the learned trial Judge and has committed no error in allowing the appeal of the Railway. She has, thus, urged to dismiss the present appeal of the plaintiff as no substantial question of law is arising for consideration of this Court.

12. Having heard learned Advocates and having perused the record of the case, it appears that there is no dispute about the fact that the delivery of consignment was delayed by about nine days. There is no dispute about the fact that the consignment was booked at the owner's risk and the consignment of the plaintiff had transited in open wagon. There is also no dispute about the fact that the Railway receipt issued by the Railway did not mention anything about the condition of the goods when the same was received by the Railway. There is also no dispute about the fact that when the delivery was given to the plaintiff, 226 stones were found damaged. On above-stated facts, question was whether the Railway could be made responsible for the claim of damage made by the

plaintiff.

13. At this stage, reference to the following decisions is required to be made:

14. In the case of Hundraj Chhangomal and Co. Vs. Union of India (UOI), relied on by learned Advocate Mr. Shah is required to be made. Hon''ble Division Bench of this Court in the said decision has held and observed in Para 19 as under:

19. We, therefore, hold that Sec. 76 is not controlled by Sec. 73 and the operation of Sec. 76 is not excluded by Sec. 74(3). The cases before us are governed by the provisions of Sec. 76, and once the plaintiffs succeed in proving that the goods in question were damaged or deteriorated as a result of delay or detention in carriage, the burden shifts on the Railway Administration that delay or detention arose without negligence or misconduct on its part or of any of its servants.

15. In the facts of that case, Hon''ble Division Bench has considered the admitted position of the consignment received by the Railway without any defective condition and the delivery made to the consignor in defective condition and has observed that in view of the provisions contained in Sec. 77C of the Act, presumption arises that the goods were not in such defective condition when they were booked, and therefore, it is not open for the Railway Administration to say that the deterioration was result of defective condition of the goods when they were booked. Ultimately, in the said decision, Hon''ble Division Bench has further held and observed as under in Para 39:

39. The Railway Administration having failed to discharge the burden cast on it under Sec. 76 of the Act, the plaintiffs are entitled to succeed on the ground that the goods were damaged or deteriorated in condition because of delay or detention in transit.

16. In another decision in the case of M/s. Tolaram Hariram (supra) relied on by learned Advocate Mr. Shah, Hon''ble Division Bench has held and observed as under in Para 19:

19. Mr. Shah, has however, contended that in view of the special provision contained in Sec. 76 of the Act, a consignor-non-owner will have no right to file a suit in a case where the damage or deterioration has been caused by delay or detention on the part of the Railway Administration. In our opinion, even this contention of Mr. Shah cannot be upheld. Chapter VII of the Act deals with the responsibility of the Railway Administration as carrier, Sec. 73 provides that the responsibility of Railway Administration is only that of a common carrier. Sections following Sec. 73 provide for restricting the responsibility of the Railway Administration in the circumstances mentioned therein. On a careful examination of the said provisions, we find that they do not provide for the competency or otherwise of a person to file a suit against the Railway Administration for damages in any of the cases where the Railway Administration will be responsible. Therefore, with a view to determine the question as to whether a

person is competent to file a suit for damages against the Railway Administration, we will have to turn to the general law of contract and not the provisions contained in Sec. 76 of the Act. This Court had an occasion to interpret Secs. 73, 74 and 76 of the Act though in a different context, in a group of First Appeal Nos. 177, 306, 564, 5494 and 830 of 1973 and 449, 450, 451, 452 and 468 to 481 of 1974 decided by J. B. Mehta and M. C. Trivedi, JJ. on October, 21, 1976. In those cases, the question was whether Sec. 76 of the Act would be applicable in cases where the goods were carried at owner's risk rate even though damage or deterioration to the goods was caused as a result of delay or detention in their carriage by the Railway Administration. This Court negated the contention raised on behalf of the Railway Administration and held that even in cases where the goods are carried at owner's risk rate if the goods got damaged or deteriorated as a result of delay or detention in their carriage, the Railway Administration would be liable under Sec. 76 of the Act. However, what is material for our purpose is the following observations made by the Division Bench of this Court:

On behalf of the Railway Administration, it is argued that the plaintiffs have not succeeded in proving that damage or deterioration of the mangoes was the result of delay or detention in transit. It was also argued by Mr. Shah for the Railway that Sec. 76 of the Act requires the owner of the goods to prove that delay or detention in transit resulted in damage or deterioration of the goods. In all the cases before us, the consignees as well as the consignors are the plaintiffs. Therefore, it cannot be said that the owners of the goods have not come forward to prove that damage or deterioration of goods was the result of the delay or detention in transit. The Section nowhere provides that the consignor or the consignee, if otherwise entitled to file a suit for damages, cannot file a suit for compensation under Sec. 76 of the Act.

If we examine the provisions contained in Secs. 74 and 76 together, it becomes clear that Sec. 76 is in the nature of a proviso or an exception to Sec. 74(3). Under Sec. 74(3), the Railway Administration would not be responsible except upon proof that the loss, destruction, damage, deterioration or non-delivery of the goods arising from whatever cause, was due to negligence or misconduct on the part of the Railway Administration or of any of its servants. Therefore, it will be for the person claiming damages to prove negligence or misconduct on the part of the Railway Administration or any of its servants. It may be noted that Sec. 74(3) of the Act speaks of damage, loss, destruction, deterioration or non-delivery arising from whatever cause. As against that Sec. 76 provides for the responsibility of the Railway Administration for loss, destruction, damage or deterioration of goods caused as a result of delay or detention in transit. In such a case, it is the Railway Administration which will have to prove that the delay or detention arose without negligence or misconduct on the part of the Railway Administration or any of its servants. Thus, the obvious intention of the Legislature in enacting Sec. 76 was to shift the burden from the claimant to the Railway Administration in those cases where the damage to or deterioration of

the goods is first proved by the owner to have been caused by delay or detention in transit. Mr. Shah has, however, contended that the words used in Sec. 76 are ".....loss, destruction, damage or deterioration of animals or goods proved by the owner to have been caused....." He has laid great emphasis on the words "proved by the owner" and on the basis of these words he has contended that it is only in those cases where the owner proves loss, destruction, damage or deterioration of the goods, that the Railway Administration will be responsible for the damages caused to the goods. He has submitted that if the owner alone is required to prove loss, destruction, damage or deterioration of the goods, it is he alone who can file a suit against the Railway Administration. In our opinion, even this submission of Mr. Shah is not justified. As well have pointed out above, the purpose of enacting Sec. 76 is not to provide for the competency or otherwise of a person to sue for damages in the circumstances mentioned therein. If a consignor can sue under Sec. 74(3) of the Act, there is no reason why he cannot sue in a case contemplated by Sec. 76 of the Act. Moreover, if the words "proved by the owner" are literally construed it would mean that it is the owner himself who has to prove the loss, destruction, damage or deterioration of the goods consigned. This interpretation may lead to certain anomalous situation, for example in a case where the owner is a minor or who cannot enter the box and give evidence or can file a suit in his own capacity. In our opinion, what the Legislature intended by enacting Sec. 76 of the Act is to provide that in case of any loss, destruction, damage or deterioration of goods arising as a result of delay or detention of the goods while in transit, the Railway Administration would be responsible to the extent the loss, destruction, damage or deterioration is proved to have been caused to the owner as a result of the delay or detention. Mr. Shah has objected to our reading this provision in this manner on the ground that we would thereby changing the language of the Section and re-enacting the provision as contained in Sec. 76 of the Act. However, it is well settled that if a literal interpretation gives rise to an anomaly or results in something which may defeat the purpose of the Act and if there are two possible constructions which can be put upon the words to be interpreted, the Courts may prefer the second construction which may not be literal may effectuate the legislative intent. In this view of the matter, we also reject the second contention of Mr. Shah.

17. In yet another decision in the case of *Brijlal Purshottamdas* (supra) relied on by learned Advocate Mr. Shah, Hon"ble the Supreme Court has held and observed as under in Para 4:

4. Section 74D envisages a disclosure in the form of a precise statement of how the consignment was dealt with by the administration followed by evidence at the trial in proof of the statement. The Section clearly contemplates that on the matter the administration should submit its evidence first at the trial, and it is only when negligence or misconduct cannot fairly be inferred from such evidence that the burden of proving the negligence or misconduct shifts to the consignor. In *Surat Cotton Spinning and Weaving Mills Ltd. v. Secretary of State*, 64 Ind. App. 176 : AIR 1937 PC 152 and *Union of India v. Mahadeolal*, 1965 (3) SCR

145 : AIR 1965 SC 1755 the Risk Notes B and Z under consideration provided that in certain cases "the Railway Administration shall be bound to disclose to consignor how the consignment was dealt with through out the time it was in its possession or control and if necessary to give evidence thereof before the consignor is called upon to prove misconduct." Section 74D does not expressly provide that the administration is bound if necessary to lead evidence as to how it dealt with the consignment before the consignor is called upon to prove misconduct or negligence but we think that this obligation is implicit in the duty of disclosure imposed by the Section.

18. Since both the learned Advocates have referred to and literally took the Court through the provisions of Secs. 74 and 76, provisions of said Sections are reproduced as under:

74. Responsibility of a Railway Administration for animals or goods carried at owner's risk note:- (1) When any animals or goods are tendered to a Railway Administration for carriage by Railway and the Railway Administration provides for the carriage of such animals or goods either at the ordinary tariff rate (In this Act referred to as the Railway risk rate) or in the alternative at a special reduced rate (In this Act referred to as the owner's risk rate), the animals or goods shall be deemed to have been tendered to be carried at owner's risk rate, unless the sender or his agent elects in writing to pay the Railway risk rate.

(2) Where the sender or his agent elects in writing to pay the Railway risk rate under sub-sec. (1), the Railway Administration shall issue a certificate to the consignor to that effect.

(3) When any animals or goods are deemed to have been tendered to be carried, or are carried, at the owner's risk rate, then, notwithstanding anything contained in Sec. 73, the Railway Administration shall not be responsible for any loss, destruction, damage, deterioration or non-delivery in transit of such animals or goods, from whatever cause arising, except upon proof that such loss, destruction, damage, deterioration or non-delivery was due to negligence or misconduct on the part of the Railway Administration or of any of its servants.

76. Responsibility for delay or detention in transit:- A Railway Administration shall be responsible for loss, destruction, damage or deterioration of animals or goods proved by the owner to have been caused by delay or detention in their carriage, unless the Railway Administration proves that the delay or detention arose without negligence or misconduct on the part of the Railway Administration or of any of its servants.

19. Section 74 sub-sec. (3) though provides that when the goods are deemed to have been tendered to be carried out or are carried out at the owner's risk rate, then, notwithstanding anything contained in Sec. 73, the Railway Administration shall not be responsible for any loss, destruction, damage, deterioration or non-delivery in transit of such goods from whatever cause arising, except upon proof that such loss, destruction, damage, deterioration or non-delivery was due to

negligence or misconduct on the part of the Railway Administration or any of its servants. Therefore, Sec. 74 does not absolutely absolve the Railway from its liability to the damage caused to the goods even if the goods were to be carried at the owner's risk rate if such damage is proved to be due to negligence or misconduct on the part of the Railway Administration. The meaning of owner's risk in Sec. 74, therefore, is that if the owner or the consignor of the goods does not prove positively that the loss or damage occurred to the goods is due to negligence or misconduct on the part of the Railway, then, even if there is damage to the goods of the consignor in transit, such consignor or owner of the goods shall not be entitled to claim from the Railway because he had already chosen to get his goods transited at his own risk rate. In Sec. 74, burden is upon the consignor or owner to prove the loss or damage due to negligence or misconduct on the part of the Railway, even though, the Railway had knowledge about the negligence or misconduct on its part. Since, the Railways Act is a special Statute and burden is provided in Sec. 74 of such special Statute upon the consignor who suffered loss or damage to his goods during the transit, such provisions would exclude the operation of Sec. 106 of the Evidence Act. However, the facts in the case on hand would be governed by Sec. 76 of the Act and Sec. 76 provides that it is for the Railway to discharge its burden of proving that the loss occurred to the goods of the consignor was not because of any delay or misconduct on the part of the Railway on consignor having proved the damage occurred to the goods during the transit.

20. In light of the above-settled principles of law, when the goods were found in damaged condition at the time of delivery of the consignment to the appellant-consignor which were undisputably delivered after a period of nine days from the reasonable period, it was incumbent upon the Railway to prove that there was no negligence or misconduct on the part of the Railway for the delay in delivering the consignment to the appellant. The goods though were to be transited at the owner's risk and in open wagon as per the request of the appellant, still, when there was delay in delivering such goods, unless it was proved by the Railway that the delay or detention of the goods arose without any negligence or misconduct on the part of the officers of the Railway Administration, the appellant-consignor would not be required to prove that the appellant had suffered damages to the goods on account of negligence or misconduct on the part of the Railway. In the case on hand, witness who was examined by the Railway had deposed that when the goods were received for booking and for loading in the open wagon, he had no knowledge about the condition of the goods. He, however, admitted that the Railway receipt issued at Exh. 19 is silent on the condition of the goods. He has also deposed that when the goods were delivered, same were found in damaged condition to the extent of 40 per cent. This officer has not explained in his deposition as to why the delay has occurred on the part of the Railway in delivering goods to the appellant and that there was no negligence or misconduct on the part of the officers of the Railway for such delay. Therefore, when there is no explanation coming forth positively stating

that there was no negligence or misconduct on the part of the Railway for delay in delivering the goods, as per provision of Sec. 76 of the Act and the law laid down by Hon'ble the Supreme Court and the Hon'ble Division Bench of this Court, it has to be presumed that the damage caused to the goods of the appellant was because of the delay caused by the Railway and such delay was only because of the negligence on the part of the Railway. Therefore, in my view, meaning of "at the consignor's (owner's risk)" occurring in Sec. 74 of the Railways Act would not take away case of the appellant from the provisions of Sec. 76 which clearly provides for discharging of burden by the Railway when there is no dispute about the delay in delivering goods to the appellant and as per the provisions of Sec. 76, it was first for the Railway to discharge its burden to prove that there was no negligence or misconduct on the part of the Railway for delay caused in delivering goods to the appellant.

21. As could be found from the plaint, the appellant has put forward the claim of damage to the goods on receipt of goods after period of sixteen days and the appellant has clearly stated in the plaint that the cause of action for the suit has arisen on or about 15-11-1980 when the delivery of the polished stones were given to the appellant firm in damaged condition due to negligence, carelessness and misconduct on the part of the Railway Administration and its servants. In the plaint, date of booking of goods and delivery of the goods are clearly provided and the claim based in the suit is on account of negligence of Railway Administration for delivering the goods in damaged condition on 15-11-1980. From the pleadings as also from the admitted evidence, it clearly comes out that the claim for damage was on account of late delivery of goods in damaged condition to the appellant. Thus, finding and observations made by the learned appellate Judge that there was no plea of delay in the plaint appear to be contrary to the pleading and also contrary to the admitted evidence. From the evidence of the officer examined by the Railway, it clearly comes out that the Railway has remained silent about the delay caused in delivering the goods to the appellant.

22. I have already discussed above that the goods remained in custody of Railway for about sixteen days and out of those 16 days, 9 days were beyond the reasonable period of 6/7 days as observed by the Courts below. When the Railway has not given any evidence as to what care was taken by it during this delayed period of 9 days, it cannot be said that the Railway has discharged its burden of proving that there was no negligence or misconduct on the part of the Railway either for delay or in handling the goods during the transit period after the reasonable period. Under the circumstances, the case of the appellant will be squarely covered by the provisions of Sec. 76 of the Act and on admitted facts, when the goods were delivered in damaged condition, the only inference which could be drawn is that it was because of the negligence and carelessness on the part of the Railway for delay and in not taking proper care in handling the goods during the transit, the appellant has suffered damage.

23. The evidence at Exhs. 19 and 20 established that the goods were not in damaged condition when the same were booked with the Railway. The case of the appellant, therefore, could not be thrown out of Court on the ground that the appellant has not taken specific plea of delay in the plaint. In the plaint, the facts of the date of booking of the goods, date of delivery of the goods, the delivery of the goods in damaged condition and also the cause of action are clearly stated. Therefore, claim of the appellant could not be thrown away simply on the ground that there is no specific averment about delay in the plaint. Learned appellate Judge has thus committed error in allowing the appeal of the Railway on the ground that the appellant has not taken specific plea of delay in the plaint. The appeal, is therefore, required to be allowed and the judgment and decree passed by the learned appellate Judge holding that the Railway is not negligent for the damage caused to the goods of the appellant is required to be reversed. However, the appellant is to be held entitled to the quantum of damage as assessed by learned appellate Judge. In the result, the appeal is partly allowed. The judgment and decree passed in Civil Appeal No. 125 of 1983, so far as it is held that the Railway is not negligent for damage caused to the goods of appellant, is quashed and set aside. The appellant shall, however, be entitled to recover the damage of Rs. 3,707-60 from the Railway with interest at the rate of 6% per annum from the date of filing suit till realisation of the amount.

The decree shall stand modified accordingly.