(1978) 07 CAL CK 0027

In the Calcutta High Court

Case No : Commercial Cause Suit No. 1776 of 1967

Jesraj Subhachand APPELLANT

Vs

Union of India (UOI) RESPONDENT

Date of Decision : 03-07-1978

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Section 80
Railways Act, 1890 — Section 77, 80

Citation : (1979) ACJ 327 : AIR 1978 Cal 536

Hon'ble Judges : Monjula Bose, J

Bench : Single Bench

Advocate : Hirak Mitter and Bhaskar Roy, for the Appellant; H.N. Dhar and Dipak Shom, for the Respondent

Judgement

Monjula Bose, J.—Non-delivery of two consignments of art silk piece goods covered by Railway Receipts Nos. 948503 and 948521, both dated Aug. 14, 1966 is the basis of the plaintiff''s claim herein for Rs. 14,746.46 as damages against the Railways, as carriers represented by the defendant Union of India.

2. It is alleged in the plaint that on Aug. 14, 1966 one R. Bhoggilal and Co., as agents of the plaintiff, delivered the said consignments to the Central Eastern Railway at Wadi Bandar Station, Bombay for carriage to Shalimar on the South Eastern Railways and there to be delivered to the plaintiff. It is alleged that on or about Sept. 17, 1966 and Oct. 3, 1966, the two Railway Receipts were duly endorsed in favour of the plaintiff within the original jurisdiction of this court. It is alleged further that the said goods were not delivered and/or were lost in transit and the plaintiff being deprived of its goods is entitled to be compensated by the defendant for the value thereof namely Rs. 14,746.46, payable to the plaintiff at its place of business within the said jurisdiction. Notice u/s 80 of the C. P. C. is alleged to have been duly served on the defendant on May 17 and 19, 1967.

3. In the written statement of the defendant it is denied that R. Bhoggilal and Co.

delivered the said goods to the defendant as agent or on behalf of the plaintiff. It is denied further that the plaintiff is the owner of or is in any way interested in the consignments or that any of the receipts were endorsed in favour of the plaintiff. It is alleged that the consignments covered under Receipt No. 948503 reached destination on Aug. 23, 1966, and delivery thereof was not taken within thirty days after termination of the transit. Accordingly it is contended that the defendant was absolved of liability if any, u/s 77 of the Indian Railways Act. The other consignment under Railway Receipt No. 948521 it is alleged was duly delivered on Sept. 19, 1966. The sufficiency and/or validity of the notice u/s 80 is disputed. It Is further contended that this Court had no jurisdiction to entertain the suit as no part of the plaintiff''s cause of action arose within the said jurisdiction.

4. By consent, the Judge''s brief of documents marked part I (except items 1 to 3 and 10 to 22) and Part II (Except items Nos. 8, 14, 15, 16 and 17) were tendered as Exts. ''A'' and ''B'' respectively the formal proof of the said documents being dispensed with. The two Railway Receipts Nos. 948521 and 948503 were tendered as Exts. ''D'' and ''F''. The goods delivery sheet, the gate pass issued in respect of the consignment covered by the Receipt No. 948521 and entries in the delivery book were tendered respectively as Exts. 5, 1, 8 and 8A. The notice u/s 80 and the two acknowledgments in respect thereof were tendered as Ext. L.

5. The following issues were raised and settled at the trial :--

1. (a) Who is the owner of the goods booked under R/R Nos. 948503 and 948521 dated, 14th Aug. 1966?

(b) Were the goods booked by Bhoggilal and Co. as an agent or on behalf of the plaintiff as alleged in para 2 of the plaint?

(c) Were the Railway Receipts endorsed in favour of the plaintiff and if so, what is the effect of the alleged endorsement?

2. Has this Court jurisdiction to try and entertain this suit?

3. (a) Is the defendant not liable for the consignment under R/R No. 948503 in view of the provisions of Section 77 of the Railways Act as alleged in para 6 (a) of the written statement?

(b) Is the defendant also not liable in respect of the consignment under R/R No. 948521 inasmuch as it has been delivered to the plaintiff as alleged in para 6 (b) of the written statement?

4. Is the notice u/s 80 of the C. P. C. valid and sufficient?

5. To what relief, if any is the plaintiff entitled?

6. The evidence of Lanka Pat Nahata, a partner of the plaintiff and its first witness is briefly as follows :--

7. The plaintiff purchased the consigned goods from R. Bhoggilal & Co. The witness received the Railway Receipts from the Union Bank of India, Ezra Street, Calcutta, the bankers of the sellers after discounting two Hundis dated Aug. 17 and 26, 1966 and the Memo of costs (Exts. ''C'' & ''E''). Endorsements in favour of the plaintiff were made on the said Receipts by the Bankers within the jurisdiction of this Court upon receipt of the price thereof. The said Receipts were thereafter endorsed by him in favour of the plaintiff''s clearing agents one S. C. Chowdhury and made over to them for clearing the goods. The plaintiff did not receive any portion of the said consignments. The plaintiff''s claim of Rs. 14,746.46 as owner of the goods included the invoice value of the two consignments, Bank commission and wharfage and freight charges paid.

8. Rai Chand Nahata, the senior partner of the plaintiff came as the next witness. His evidence was more or less similar to that of his brother Lanka Pat except that he denied that Bhoggilal & Co. was the agent for the plaintiff or that there was any agreement by and between the plaintiff and the defendant for payment of any money within jurisdiction as alleged in the plaint.

9. S. C. Chowdhury the next witness for the plaintiff had acted as the clearing agents in respect of the disputed consignments. He deposed as to the procedure for clearing goods at the Shalimar Railway Yard. The Railway receipts first had to be deposited with the dealing clerk, who made necessary endorsements thereon, indicating where the goods would be located. Thereafter, goods delivery sheet had to be submitted for the issue of a gate pass, for taking out the goods. No one could take goods out of the Railway premises without a gate pass which had to be surrendered to the Mark Checking clerk on duty. When goods were taken out, entries were made in the ''Mark Checking Register'' as also on the gate pass. He paid the freight and wharfage charges up to Sept. 19, 1966 for the consignments covered by Ex. ''D''. The receipt for the payments was tendered as Ex. M. After submitting the Goods Delivery Sheet, he obtained a gate pass (Ex. I) but could not trace the goods. The matter was reported to the dealing clerk. The Gate Pass continued to be in his possession. There was no endorsement showing delivery on the document. His letter dated Sept. 20, 1966 (Ext. N) recording the non-delivery of the goods was received at the Railways Office, but it was not replied to.

10. On Oct. 4, 1966 he went to Shalimar to clear the other consignment covered by the other Receipt (Ext. F). He paid freight and wharfage charges but could not get delivery of the goods.

11. The last witness of the plaintiff was one Bhamwarilal Jain, the Honorary Joint Secretary to the "Railway Forwarding and Clearing Association." He had been a clearing agent at Shalimar for the last nine years. He deposed about the system of delivery of consignments at Shalimar for taking delivery. First, Railway Receipts are produced at the delivery counter to ascertain whether goods have been unloaded and were ready for delivery. These endorsements are made on the Receipts showing the date of unloading, the number of the wagon from which

the consignment had been unloaded and the subsequent location of the goods. The Receipts are thereafter produced at the rate counter for endorsement of freight and other charges. After payment of the charges, cash receipts are issued at the cash counter. Thereafter goods delivery sheets are issued and the agent visits the relevant sheds to locate the goods. On submission of the delivery sheet, a gate pass is issued. When goods are located and taken out from the Railway premises the gate pass has to be surrendered to the Mark checking clerk who inserts a tally mark on the pass. The numbers of the gate pass, and the consignment and the name of the party taking delivery are also recorded in the mark checking Register. Absence of endorsements on a gate pass would mean that goods had not been delivered. No delivery can be taken without surrendering the gate pass.

12. Mr. Jayanta Mukherji a goods clerk employed at Shalimar for the last 13 years was the first witness for the defendant. He stated that the consignments in question had been unloaded and entries had been made by him in the unloading register Ex. ''7A''. He also stated that it was possible during rush periods to take out goods without surrendering the gate pass. He however admitted that he had nothing to do with the physical delivery of goods.

13. The defendant''s next witness, Gopal Chandra Banerjee, was posted at the material time at 7A shed of Shalimar Railway Yard as a senior goods clerk and had assisted the Mark Checker in 1966. He stated that on submission of the gate pass the goods are taken out and tallied by the Mark Checking clerk with the assistance of others. During heavy rush it is not possible to check every item. Entries are made in the Mark Checking Register, number of gate pass, name of parties, number of lorry etc. are recorded therein. The volume of business done on a particular day can be ascertained from this document. In 1966, one S. C. Santra was the Mark Checking clerk and one P. C. Das who has since retired was the shed-in-charge. It was possible to take out goods during peak hours or heavy rush without surrendering the gate pass.

14. The last witness for the defendant was one Samarendra Nath Pal who was working as a delivery clerk at the Bombay counter at Shalimar in 1966. He stated that the goods covered by the Receipt No. 948503 (Ex. ''F'') were unloaded on Aug. 23, 1966 and delivered on Oct. 4, 1966. The goods under Receipt No- 948521 (Ex. D) were unloaded on Aug. 23, 1966 and delivered on Sept. 19, 1966. Entries to that effect appeared in the Delivery book in the writing of A. B, Kundu the posting clerk. He admitted that he was only concerned with the books at the delivery counter, and had nothing to do with the physical delivery of goods. His duty ended with the issue of the shed delivery order after freight and other charges were passed. He admits further that without a gate pass it was not possible for the Mark Checking clerk to make any tally.

15. Mr. H.M. Dhar, learned counsel for the defendant, in his argument contended that it was R. Bhoggilal & Co., the consignor, and not the plaintiff who could have instituted this suit. When the goods were booked to Shalimar the plaintiff was

not the owner. He contended from this, that endorsements on Railway Receipts by itself did not transfer the property in the goods to the endorsee. Unless it was pleaded that the purchase was for valuable consideration the plaintiff could not claim as the owner. In support of his contentions Hari Mohan Dutt Vs. Dominion of India, , AIR 1947 169 (Bom.) , and AIR 1930 57 (Privy Council) (1).

16. Mr. Dhar contended further that the case in the plaint that Bhoggilal & Co. delivered the goods at Wadi Bandar as agents of the plaintiff and that in the contract of carriage embodied in the said Receipts figured as an agent of the plaintiff, had been given a go-by and not established by evidence at the trial and in fact denied by plaintiff''s witness R.C. Nahata.

17. Mr. Dhar next contended that the plaintiff sought to evoke jurisdiction of this court on the following (a) that the endorsements on the Railway Receipts in favour of the plaintiff were made within the said jurisdiction and (b) that the sum claimed i.e. Rs. 14,746.46 was payable to the plaintiff at its place of business within the said jurisdiction under the agreement between the parties. He submitted that the agreement as pleaded has not been proved and on the contrary has been denied by the plaintiff''s witness R. C. Nahata (Q. 46). On the other aspect Mr. Dhar submitted that a mere endorsee of railway receipts was not entitled to sue thereon and that pleading of a mere endorsement without a further pleading of valuable consideration cannot confer jurisdiction. For this proposition Mr. Dhar cited the following decisions :--

(a) Commissioners for the Port of Calcutta Vs. General Trading Corporation Ltd. and Another, . (b) I.S.P. Trading Co. Vs. Union of India (UOI), and (c) Jagannath Chetram Vs. Union of India (UOI), .

Mr. Dhar further contended that this court otherwise had no jurisdiction to entertain and try this suit as admittedly the Headquarters of the Railway concerned i.e. the South Eastern Railway was situated at Garden Reach outside the jurisdiction of this Court. On the authority of a decision of the Supreme Court viz. Union of India v. Ladulal Jain, reported in AIR 1963 SC 168]. Mr. Dhar submitted that a suit could be filed only in the court within whose jurisdiction the Headquarters of the railway would be situated.

18. Mr. Dhar next contended that for non-delivery of the consignment under the Receipt No. 948503 (Ex. ''F'') the defendant was exempted from all liability u/s 77 of the Indian Railways Act 1890 which reads as follows :--

"77. Responsibility of a Railway Administration after termination of transit -- No responsibility (sic) of Railways as bailee for loss, destruction, damage or non-delivery of goods carried by railway within a period of 30 days after the termination of transit."

19. Mr. Dhar submitted that it was the plaintiff''s case that the consignment in question arrived at its destination on Aug. 23, 1966. The oral evidence of S.C. Chowdhury supported by Ex. ''O'' showed that the consignment admittedly

remained in the defendant''s godown until Oct. 4, 1966, when for the first time it was sought to be cleared on plaintiff''s behalf.

20. The consignment under the other Receipt No. 948521 (Ex. ''D'') Mr. Dhar contended had been duly delivered as evidenced by the Railway goods Delivery sheet (Ex. 5) which had been duly signed by S. C. Chowdhury, the plaintiff''s clearing agents. The production of the unendorsed gate pass Ex. ''I'' by the plaintiff did not controvert the case of the defendant as it was possible to clear goods without surrendering the gate passes.

21. Mr. Dhar next contended that as damages had not been proved the suit must fail. The market price of goods on the due date of delivery by the Railways was required to be proved by the plaintiff which it had failed to prove. The invoice value of the goods was not relevant for ascertaining damages for non-delivery. In support of his contention Mr. Dhar cited a passage from Rao on Damages (3rd Edition) at p. 756, and a decision of the Supreme Court in Murlidhar Chiranjilal Vs. Harishchandra Dwarkadas and Another, .

22. Mr. Dhar lastly contended that the notice u/s 80 of the CPC in the instant case was insufficient as neither the plaintiff''s acquisition of title or ownership in the said goods nor the endorsement of the receipts in favour of the plaintiff for valuable consideration had been stated therein. He also pointed out that the period fixed in the notice was also not in conformity with Section 80.

23. Mr. Hirak Mitra, learned Counsel for the plaintiff submitted on the other hand that there was no real dispute as to ownership of the goods. In fact, it was suggested by learned Counsel for the defendant to the plaintiff''s witness L.P. Nahata that the plaintiff became owner of the goods on Aug. 8, 1966 and not earlier.

24. While conceding that mere endorsement did not pass title Mr. Mitra submitted that the plaintiff has proved by oral and documentary evidence that for valuable consideration namely payment of the said two bills for Rs. 7678.85 and 7602.00 endorsements were effected in its favour on the said two Railway Receipts and it became the owner of the goods in question. Such endorsements having been made within jurisdiction, a part of the plaintiff''s cause of action arose within jurisdiction.

25. Relying upon the principles enunciated in Bhagwati Prasad Vs. Shri Chandramaul, , Mr. Mitra submitted that considerations of form could not, override considerations of substance and any lacuna in pleadings cannot be allowed to defeat the plaintiff''s legitimate claims.

26. Mr. Mitra distinguished the decisions in Hari Mohan Dutt Vs. Dominion of India, and AIR 1947 169 (Bom.) where it was held that mere endorsement of a Railway Receipt did not transfer property but only entitled the endorsee to collect the goods as agent of the consignee.

27. On issue 1 (b) Mr. Mitra conceded that the plaintiff had departed from its

case in the plaint that R. Bhoggilal & Co., delivered the goods to the Railway as agents of the plaintiff. But he submitted that this variance between pleading and proof was not sufficient to merit dismissal of the suit, as no prejudice was caused to the other side. In this connection, he cited Haji-Umar Abdul Rahiman v. Gustadji Murcherji Cooper reported in 20 Cal WN 297 : (AIR 1915 PC 89). In that case there was variation between pleading and proof as to the date of a promissory note. The Court held that such variation was not fatal to the suit where the point to be decided was whether the debt had been repaid in cash and whether the promissory note was a forged document. Mr. Mitra also sought to distinguish the decision of the Privy Council in the case of AIR 1930 57 (Privy Council) . There the case pleaded was that land had been transferred to the plaintiff to be held on Trust. Thereafter the plaintiff proceeded to prove that he obtained the land as a gift in his favour. This new case going to the very root of the matter not having been pleaded was disallowed. Mr. Mitra contended that in the instant case the cause of action pleaded is that the plaintiff being deprived of goods belonging to it is entitled to the value thereof as compensation. The case cited was thus not departed from. He contended further that Commissioners for the Port of Calcutta Vs. General Trading Corporation Ltd. and Another, cited on behalf of the defendant also did not stand in the way of the plaintiff''s claim. It was laid down therein that apart from the contract of carriage, the Railways could further be liable in tort for conversion, and it was only the owners who could maintain such an action.

28. Mr. Mitra cited Union of India (UOI) Vs. Kamal Kumar Goswami and Others, where a Division Bench of this Court laid down that leave under Clause 12 granted by Court need not be confined solely to the averments made in the plaint, and that "carrying on business" referred to in Clause 12 of the Letters Patent should not be given a restricted meaning. It was held in that case that the Government of India was carrying on business in Calcutta where the head office of its Railway undertaking was situate. In the Instant case also it is the admitted position that the head office of the Eastern Railway is situated at Fairlie Place Calcutta within the jurisdiction of this Court. Moreover the payment of the price and the endorsement of the Railway Receipts for valuable consideration have been proved to have taken place within the jurisdiction. Mr. Mitra submitted that it has been duly established that this Court had jurisdiction to try and entertain this suit.

29. As to the sufficiency and validity of the notice u/s 80 of the Code of Civil Procedure, Mr. Mitra cited Beohar Rajendra Sinha and Others Vs. State of Madhya Pradesh and Others, where it was laid down by the Supreme Court that the object of such a notice was to enable the Government or the public Servant concerned to consider the legal position involved, and although, such a notice was imperative, it had to be reasonably construed. Any error or defect in such a notice could not be permitted to be treated as an excuse for defeating a just claim. In the case before the Supreme Court a notice given by a Karta was held to be sufficient to sustain a suit brought by the coparceners.

30. Mr. Mitra next cited The State of Madras Vs. C.P. Agencies and Another, , where the Supreme Court held that a notice u/s 80 of the Civil P. C. was not to be scrutinised in a pedantic manner divorced from commonsense. Mr. Mitra also cited Buridehing Tea Co. Ltd. Vs. Dominion of India, for the proposition that a notice u/s 80 could not be held to be defective if payment had been demanded earlier, if in fact the suit was filed after the expiration of the statutory period.

31. Mr. Mitra contended next that the defendant had to establish that goods under Receipt No. 948503 were lost after 30 days of termination of their transit before the defendant could claim exemption u/s 77 of the Indian Railways Act. The evidence on record on the contrary was that the goods were very much in existence and in the possession of the defendant at the relevant time. In his letter dated Nov. 2, 1966 the goods Inspector recorded that the goods were lying at Shalimar undelivered and directed that delivery should be taken on payment of wharfage and/or demurrage incurred. Two days thereafter when S.C. Chowdhury sought to collect the goods demurrage and wharfage were accepted from him. On this evidence it could not be said that the consignment was lost after 30 days of the arrival of the goods at destination. In this connection Mr. Mitra cited Governor-General in Council Vs. Lala Debi Sahai, , where in construing Section 75 of the earlier Railways Act of 1820, corresponding to Section 77 of the present Act, the Court held, when protection u/s 75 of the Railways Act was sought, in a suit for damages for non-delivery if the plaintiff proves non-delivery, it is incumbent on the carrier to prove that the consignment was lost or destroyed and that everything had been done to trace the missing articles.

32. For the same proposition Mr. Mitra also cited K.V.V. Ardhanari Chettiar and Co., by managing partner K.V.V. Ardhanari Chettiar Vs. The Union of India (UOI) and Another, and Union of India v. D. N. Mondal reported in (1959) 63 Cal WN 253. Lastly he cited Suraj Nath Prosad Kedarnath Vs. Union of India (UOI), for the proposition that non-delivery by itself did not indicate loss.

33. As to the consignment covered by Receipt No. 948521 (Ex. ''D'') Mr. Mitra contended that it has not been seriously disputed that the same remained undelivered. On Sept. 20, 1966 S.C. Chowdhury submitted a complaint in writing alleging non-delivery of goods covered by the said receipt Ex. ''D''. The receipt of this letter was duly acknowledged by the Railways as will appear from the endorsement on Ex. ''N''. Yet, no reply was given thereto denying non-delivery and/or recording that the consignment in question had already been delivered on Sept. 19, 1966 as sought to be proved at the trial.

34. The gate pass issued in respect of the consignment (Ex. I) which has remained in the possession of the plaintiff if considered in the background of the unchallenged testimony on the procedure, established that the consignment had not been delivered. Mr. Mitra also submitted that the Mark checking Register, a document in the possession of the defendant if produced, would have conclusively established the particulars of delivery and the same not having been

produced an inference adverse to the case of the defendant must be drawn. He cited Union of India (UOI) Vs. West Punjab Factories Ltd., where the Supreme Court noted that it was the practice of the Railways to have the delivery book signed and credit vouchers issued in respect of freights even before goods were unloaded, and that there was token delivery before real delivery. The evidence of the witnesses of the defendant according to Mr. Mitra were of no assistance to the Court as admittedly none of them had any thing to do with delivery of the consignments.

35. Mr. Dhar learned counsel for the defendant, submitted in reply that the case of Beohar Rajendra Sinha and Others Vs. State of Madhya Pradesh and Others, cited on behalf of the plaintiff did not advance the latter''s case inasmuch as there was nothing in the notice to indicate that the plaintiff claimed ownership of the goods by endorsement for valuable consideration and thus a material part of the plaintiff''s cause of action had been omitted. Conversion ha urges, was never pleaded in the plaint and in any event proper measure of damages in conversion is market value of the goods at the time of conversion which had not been proved. On the authority of Clerk and Lindsell, Law of Torts, 10th Edition page 453 he submitted that the market price of the goods after Aug. 23, not being proved the plaintiff was not entitled to a decree for damages.

36. In my view, it has been established by evidence that the plaintiff had paid for the consignments and that endorsements were made in its favour on the relevant Railway Receipts for valuable consideration. Though such endorsements for valuable consideration have not been pleaded and the case in the plaint that R. Bhoggilal & Co. despatched the goods as an agent of the plaintiff has been given a go-by at the trial, yet the same in my opinion are not sufficient to non-suit the plaintiff. Such mere technicalities cannot be allowed to defeat the substance of the claim.

37. The decisions cited by the defendant show that suit by a mere endorsee is not maintainable but in those cases it was not in evidence that title to goods had in fact passed to the plaintiff for valuable consideration as in the instant case, and the said cases are hence distinguishable.

38. On the aspect of jurisdiction, I note that the head office of the Railway concerned is situated at Fairlie Place, Calcutta within the jurisdiction of this court and therefore, on the authority of Union of India (UOI) Vs. Kamal Kumar Goswami and Others, it cannot be said that this court has any fundamental lack of jurisdiction. This apart, the endorsement on the railway receipts, a material part of the plaintiff''s cause of action, admittedly was made within the said jurisdiction. For these reasons the defendant''s objection to the jurisdiction of the Court to try and entertain this suit cannot be sustained.

39. As to the notice u/s 80 of the Civil P. C. though Ex. "L" does not state that the plaintiff has become the owner of the goods upon endorsement of the receipts for valuable consideration, yet it is sufficiently clear therefrom that the

plaintiff was claiming as an owner for non-delivery of the consignment. Moreover, it appears from Exts. ''H'' and T that by two several prior notices dated 11-10-1966 and 18-11-1966 the defendant had been intimated that the plaintiff was claiming as an endorsee for valuable consideration and this fact was therefore not a complete surprise to the defendant, who did not deny receipt of the said two exhibits. In my view, the Section 80 notice, namely, Ex. ''L'' sets out the plaintiff''s cause of action in this suit with sufficient clarity and is in due compliance with the requirements of Section 80 of the Civil P. C.

40. For the reasons aforestated, I hold that the consignment under the said receipt No. 948521 (Ex. D) was not delivered to the plaintiff and I am emboldened to take this decision for the following reasons :--

(a) The common evidence of the parties is that signature or endorsements on the shed delivery sheet (Ex. 5) do not establish physical delivery of goods as thereafter a gate pass is invariably issued for obtaining delivery. The defendant could not adduce any other evidence or acknowledgment of delivery except Ex. ''5'' the shed delivery sheet to establish delivery. This exhibit furthermore is not conclusive to prove actual delivery inasmuch as it also records delivery of the consignment under receipt No. 948503 (Ex. F) which in any event is not the case of the defendant.

(b) The defendant having failed to produce the Mark Checking Register without any explanation for its non production an adverse inference has to be drawn against the defendant.

(c) The gate pass (Ex. T) which has been produced by the plaintiff from its possession and the letter dated Sept. 20, 1966 Ex. ''N'' from the clearing agent complaining of non delivery corroborates the plaintiff''s case.

(d) None of the witnesses called on behalf of the defendant had anything to do with actual physical delivery of goods at Shalimar or with the delivery of goods in dispute and it has not been established by them that the goods in question had in fact been delivered to the plaintiff.

(e) I have no reason to disbelieve the evidence of S.C. Chowdhury, Clearing Agent of long standing and experience who is not an employee of the plaintiff, whose evidence as to procedure remained unchallenged in cross examination and in fact supported by the defendant''s own witnesses.

41. As to the defendant''s claim for exemption from liability u/s 77 of the Indian Railways Act in respect of the consignment covered by the Railway Receipt No. 948503 (Ex. ''F'') following the principles enunciated in K.V.V. Ardhanari Chettiar and Co., by managing partner K.V.V. Ardhanari Chettiar Vs. The Union of India (UOI) and Another, and Suraj Nath Prosad Kedarnath Vs. Union of India (UOI), , I hold that the loss of the said consignment has not been established by the defendant which would have entitled it to claim exemption under the said section. On the contrary, it appears from the documents adduced Exs. ''4'' and

''O'', as well as from the oral evidence on record that the consignment was in existence on Oct. 4, 1966 and in fact the defendant collected wharfage and demurrage charges and called upon R. Bhoggilal & Co. to take delivery of the consignment on the basis of its existence.

42. In my view the plaintiff founded its action not only on the contract of carriage but also for the loss of the goods, as owner thereof. This latter part of its case, it has been able to establish, namely that it is the owner of the goods for valuable consideration and by reason of non delivery of the said goods to it, it is entitled to damages. I hold therefore that the plaintiff is entitled to be compensated for non delivery of its goods, and even if the evidence is assumed to be insufficient to quantify the damages suffered with mathematical exactitude the court is bound to award some compensation on the available evidence and in the instant case the plaintiff having proved the price of the goods including the bank and freight charges thereon is entitled to a decree for such sum.

43. For all the reasons aforestated I answer the issues as follows :--

1 (a) The plaintiff is the owner of the goods booked under R/R Nos. 948503 and 948521 both dated 14th Aug., 1966.

(b) No;

(c) The railway receipts were endorsed In favour of the plaintiff for valuable consideration and title to the said goods was thereby transferred to the plaintiff;

2. Yes, this court has jurisdiction to try and entertain the suit;

3 (a) No; the defendant is liable for the said consignment;

(b) No; the consignment in question has not been delivered to the plaintiff and the defendant is liable therefore.

4. Yes.

5. The plaintiff is entitled to a decree for Rs. 14,746.46 interim interest, and interest on judgment thereon at 6% and costs. Operation of the decree is stayed for 8 weeks.