

(1958) 07 PAT CK 0016
In the Patna High Court
Case No : A.F.O.D. No. 120 of 1952

Madan Lall and Another

APPELLANT

Vs

The Union of India (UOI)

RESPONDENT

Date of Decision : 24-07-1958

Acts Referred:

Interest Act, 1839 — Section 1
Limitation Act, 1908 — Article 31, 9
Railways Act, 1989 — Section 77

Citation : AIR 1959 Patna 165 : (1958) 6 BLJR 688

Hon'ble Judges : Raj Kishore Prasad, J

Bench : Single Bench

Advocate : Lalnarayan Sinha, Krishna Prakash Sinha and Permeshwar Prasad Sinha, for the Appellant; P.K. Bose, for S.G. Ghose, for the Respondent

Final Decision : Allowed

Judgement

Raj Kishore Prasad, J.—The sole question for determination in the present appeal is a question of limitation. The question is when limitation is to commence under Article 31 of the Indian Limitation Act, in the case of non-delivery of goods, if no request for delivery of non-delivered goods has been made, but only a claim for compensation for non-delivery of the goods has been made in terms of Section 77, Indian Railways Act? In other words, in such a case, how is the expression "when the goods ought to be delivered" occurring in the third column of Article 31 to be construed to mean and when time would begin to run under Article 31.

2. Plaintiffs have appealed from the judgment of Mr. T. P. Mukherji, Subordinate Judge of Darbhanga, dismissing their suit for damages for non-delivery of 120 bags of linseed weighing 273 maunds, which were despatched by them from Samastipur Railway Station, on the then O. T. Railway, for delivery at Lilloah, a station on the then E. I. Railway.

3. The above consignment was booked on the 121th June, 1948, and on the evidence it should have been delivered latest by the 30ih June, 1948, but it was

never delivered to the consignee at all. The plaintiffs, the consignors, therefore, sent a notice u/s 77, Indian Railways Act, and thereafter several letters to the Railway Authorities of both the Railways, but they did not receive any reply promising delivery of the goods, or payment of the price thereof as claimed, and, therefore, they brought the present suit, out of which the present appeal arises for damages for non-delivery, after service of a notice u/s 80, Civil Procedure Code.

4. The suit was contested by the defendant railway on several grounds, but, on the present appeal, we are concerned only with one ground, and that is the question of limitation.

5. The learned Subordinate Judge found that as the consignment was not booked by the plaintiffs under any special contract in the shape of any risk note or the like limiting the liability of the Railway Administration for the loss thereof and as no evidence has been adduced by the Railways that the loss of the consignment took place in spite of the necessary care taken by them, the defendant was liable for damages for the loss, if the plaintiffs' suit was not barred by limitation.

The learned Subordinate Judge, however, held that the suit was governed by Article 31 of the Indian Limitation Act and as the consignment was booked on the 12th June, 1948, and, as the usual time taken in the transit from Samastipur to Lilloah was about 15 to 20 days, the Suit instituted on the 22nd November, 1949 was barred by limitation. On this finding the plaintiffs' suit was dismissed.

6. In support of the appeal Mr. Lalnarayan Sinha, Government Advocate; very strongly contended that the view of the law taken by the court below is wrong and that in the circumstances of the present case limitation commenced to run from the 14th February, 1949, when the plaintiffs received the last letter (exhibit 5/c) from the Eastern Railway, and not from the 30th June, 1948, as wrongly held by the court below. Mr. Sinha contended that 14th February, 1949 should be taken to be the date when the goods ought to have been delivered, because the Railway in its last letter (Ext. 5/c) promised to let the plaintiffs know finally shortly as enquiries were under progress, but, actually thereafter the plaintiffs were never informed at all, and, therefore, after waiting for about nine months they were obliged to institute the suit on the 22nd November, 1949.

Mr. Sinha's argument was that in case of non delivery of goods even when a claim for compensation u/s 77, Railways Act, is made, and, finally the railway refuses either to deliver the goods or to pay the compensation, or, if the Railway says that the matter was receiving attention, but ultimately it does not inform the plaintiffs at all, the date of the last letter when the Railway promised to inform finally, but did not inform as was the case here, should be the date of commencement of the limitation under Article 31.

In support of his argument, the learned Government Advocate, placed reliance on Bengal and North Western Ry. Co. Ltd. Vs. Kameshwar Singh Bahadur ; The Governor-General in Council Vs. Kasiram Marwari, : Union of India (UOI) Vs.

Bansidhar Modi, ; Mutsaddi Lal Vs. Government-General in Council, and The Governor-General in Council Vs. Khadi Mandali, .

7. Mr. P. K. Bose, who appeared for the railway-respondent, however, in reply, contended that on the evidence of P. W. 1 himself it would appear that the usual time taken in the transit or consignment from Samastipur to Lilloah was about 15 to 20 days, and, therefore, on this evidence the consignment in question ought to have been delivered in normal course by the end of June, 1948, and, as such, 30th June, 1948 should be considered to be the time when the goods ought to have been delivered for the commencement of the limitation within the meaning of Article 31 of the Limitation Act

Mr. Bose further argued that the cases relied upon by Mr. Sinha were not applicable here, because in these cases a demand was made by the plaintiff for delivery of the non-delivered goods and the Railway refused to deliver them, but here no such demand was at all made by the plaintiffs, and, the only demand made by them was for payment of compensation for the price of non-delivered goods. In support of his contention he relied on Gopi Ram Gouri Shankar Vs. G.I.P. Ry. Co., ; Gajanand Rajgoria and Another Vs. Union of India (UOI), ; Shamburam Agarwala Vs. Union of India (UOI), and Jwala Datt Gobind Ram Vs. Union of India (UOI) and Others, .

8. "There is no dispute that Article 31 of the Indian Limitation Act applies here. Article 31 reads thus:

"31. Against a earner for compensation or non-delivery of, or delay in delivering goods.

One year.

When the goods ought to be delivered."

9. On the language of Article 31 it is plain that the suit for compensation against a carrier for non-delivery of, or delay in delivering goods is one year from the time "when the goods ought to be delivered." The expression "when the goods ought to be delivered," occurring in the 3rd column of Article 31, has been the subject-matter of several judicial decisions. The above expression has been construed in the case of non-delivery, or short delivery, or part delivery, when a request for delivery of the non-delivered goods has been made, as meaning when the Railway Company finally said that the goods would not be delivered and, time, therefore, would begin to run under Article 31 from after a definite refusal or declaration of inability to deliver the goods by the Railway Company.

There is, however, no direct authority of any Court as to what this expression is to be construed to mean and when time would begin to run under Article 31, in a case, when no specific request for delivery of the non-delivered goods has been made, but only a notice u/s 77, Railways Act, claiming only compensation for non-delivery has been given.

10. It is, however, now well settled that the question "when the goods ought to be delivered" is essentially a question of fact, and, no universal or inflexible rule can be laid down that time must begin to run from the expiry of the ordinary period of transit, or, from the date when one out of many units of the consignment was delivered; but the position is different where the time fixed for delivery of the goods is mentioned in the contract itself.

But where no such time is mentioned, the facts and circumstances of each case will determine "when the goods ought to be delivered." If no particular date is specified for delivery it must be determined as a matter of what is reasonable having regard to the circumstances of the contract and the conduct of the parties.

11. The above view was taken by Das, J., as he then was with whom Banerji J., agreed in *Union of India (UOI) Vs. Bansidhar Modi*, and, also by Ramaswami, J., as he then was, with whom B. P. Sinha, J., as he then was agreed in *The Governor-General in Council Vs. Kasiram Marwari*. Before I examine the cases cited by the learned counsel for the parties, I wish to express here and now my cordial concurrence in the views expressed by their Lordships in the above mentioned two cases, and, I would respectfully adopt the same, I may mention that the above views were reaffirmed in *Gajanand Rajgoria and Another Vs. Union of India (UOI)*, by Imam, C.J., and Das, J., as then they were.

12. Mr. Bose's line of reasoning that when no demand for delivery of the goods is made, but only a demand for payment of compensation for the non-delivered goods is made, the last letter of the Railway refusing to pay the claim should not be considered to be starting point of limitation, but the time when the goods in the usual course ought to have been delivered should be taken to be the starting point of limitation appeared to me at first *ex facie* attractive, because in Article 31 the words used are "when the goods ought to be delivered" and, not when a claim for compensation is made, as required by Section 77 of the Indian Railways Act or when such claim is refused. There is no exact case on all fours here in which, as I have mentioned before, this question has been considered, but there is one case *Bengal and North Western Ry. Co. Ltd. Vs. Kameshwar Singh Bahadur*, in which similar was the situation. In that case, which was decided by Courtney Terrell, C.J. and, Fazl Ali J., as then they were after the short delivery the plaintiff's manager on the 23rd October, 1922, wrote to the Railway Authorities submitting a claim for non-delivery and setting forth precise particulars and asking for an early settlement.

The learned Chief Justice of this Court, Sir Courtney Terrell, who delivered the main judgment of the Court, and with whom Fazl Ali, J., agreed, while considering the question of limitation and if the suit began on the 4th October, 1923 was in time, at pages 76-77 (of ILR Pat): (at p. 48 AIR), observed:

"But there is another aspect of the case which is even more conclusive against the defendant's contention. The plaintiff on the 23rd October, wrote to the defendants of the loss. He was justified in waiting to bring his suit until the

defendants had made it clear that they had no intention of delivering the goods. Had the position been reverse the defendants would not have hesitated to contend that a suit was premature which did not give them a reasonable opportunity of fulfilling the terms of the contract. The defendants by a deliberate process of ignoring the plaintiff's repeated requests for attention to his claim misled him into delaying his suit and it is not open to them now to contend that the suit has been brought too late.

In my opinion, the attitude of the railway company has throughout been lacking in candour and their defence to this suit even in its most technical aspects has no merit." In the above case there was shortage and the goods were delivered in instalments and a claim for non-delivery was submitted by the plaintiff and there was no demand for delivery of the goods. But the Traffic Manager of the Railway in his last letter mentioned that the consignment was delivered to the plaintiff as received and that he regretted he could do nothing in the matter. Their Lordships upheld the decree of the court below decreeing the plaintiff's suit rejecting the plea of limitation put forward by the defendant railway,

13. It may, however, be mentioned that in the just-mentioned case the distinction, which is now sought to be made, was not put forward, and, therefore, that case cannot be considered to be an authority in the particular case. Mr. Bose therefore, contended that the above case does not meet his point that if the plaintiff makes no demand for delivery of the goods, but only makes a claim for the price thereof, then the plaintiff would not be entitled to wait till the end for a reply from the railway in expectation of the goods to be delivered, to him, because in such a case there is no question of expectation of getting the goods, in that, the plaintiff having taken that the goods have not been delivered and will not be delivered to him, as a last resort made the claim for compensation.

14. There is no doubt that in the case of short delivery as also in the case of non-delivery of the goods, if a request for delivery of the goods is made, if the goods do not reach the destination on the date when in the normal course of affairs they are expected to reach there and the railway administration on being so approached for delivery holds out hope to the plaintiff that the goods would be delivered and that the matter was being enquired into, then the starting point of limitation under Article 31 cannot be said to be the date on which the goods should have reached the destination in the normal course.

The phrase "when the goods ought to be delivered" means the point of time at which the carrier undertakes to deliver the goods or the date when the carrier informs the consignee that it would be delivered or when the carrier communicates to the consignee its inability to deliver the goods on a reasonable date that may be fixed on a consideration of events subsequent to the handing over the consignment to the carrier for carriage. It is significant to note that the expression "when the goods ought to be delivered" is not followed by the phrase "in the normal course of business." If the law contemplated only the period

required in the ordinary course of business for the transit then the words "in the ordinary course of business" should also have occurred there: Mutsaddi Lal Vs. Government-General in Council, .

15. It is not necessary to deal with these cases where a request for delivery of goods was admittedly made, but the Railways failed to deliver them, because to such cases the principles above stated would apply. But I propose to notice the cases relied upon by Mr. Bose because in his submission, they support his contention referred to earlier.

16. The first case relied upon is a Bench decision of this Court in Gopi Ram Gouri Shankar Vs. G.I.P. Ry. Co., . This was a case of short delivery. It was held by Jwala Prasad and James JJ. on the facts and circumstances of that particular case that in suit for non-delivery, where no portion of the consignment has been delivered, it is some times necessary to take evidence on the question of when the consignment ought to have been delivered, which must in any case be regarded as a question of fact, but where a great part of a consignment has been delivered on a certain day, there is ordinarily no necessity to enter into evidence on the question of when the balance of the consignment ought to have been delivered, because the time when the consignment as a whole ought to have been delivered is manifestly the time when the greater part of the consignment arrived at its destination.

In that case six bales of cloth were consigned out of which four bales were delivered on the 29th November, 1920 but the other two bales were not found. Their Lordships held on the evidence in that case that the date on which the goods ought to have been delivered was the 29th November, 1920, on which date four bales out of six bales, were delivered and accordingly the plaintiff's suit having been filed beyond one year as required by Article 31 of the Limitation Act, was barred by time.

17. The next case relied upon is also a Bench decision of this Court. It is a decision of Imam, C.J. and Das J. as they were then, in Gajanand Rajgoria and Another Vs. Union of India (UOI), . In that case a consignment of 200 bags of sugar was booked from a certain railway station, but when the consignment arrived at its destination, 8 bags of sugar were found cut and damaged and on being reweighed a shortage of 11 maunds and 1 seer was found. The petitioners took delivery of the 200 bags of sugar on the 5th April, 1950, under a qualified receipt and thereafter after having got a final reply from the railway on the 8th June, 1950 denying liability for the shortage, the plaintiff brought the suit on the 7th June, 1951.

Their Lordships having regard to all the circumstances, held that the date when the goods ought to be delivered in that case should be the 5th April 1950, and, therefore, the claim of the plaintiff was barred by limitation. Some of the cases relied upon now, such as Bengal and North Western Ry. Co. Ltd. Vs. Kameshwar Singh Bahadur, and The Governor-General in Council Vs. Kasiram Marwari, were

considered and distinguished on the ground that the facts of the case before them were entirely different from the facts of the above two cases and the other cases on which reliance was placed before their Lordships.

18. The last case upon which strong reliance was placed by Mr. Bose is a decision of a learned single Judge of this Court, Kanhaiya Singly J. in *Shamburam Agarwala Vs. Union of India (UOI)*, . This was a case of short delivery. Out of 37 bales, 35 bales were delivered on the 8th January, 1948, and, of the remaining two bales, one was found to be missing on the 20th January, 1948, when an open delivery was taken and some articles were found to have been removed from the other bale.

Correspondence started between the railway and the plaintiff of that suit and the railway finally repudiated its liability on the 11th February, 1949 and thereafter the plaintiff of that suit filed the suit on the 20th July, 1949. His Lordship after a consideration of the authorities, some of which have been cited here also, such as *Union of India (UOI) Vs. Bansidhar Modi*, on the circumstances of that particular case held that there was no question of giving the consignee a hope that the missing goods would be delivered and as a matter of fact there was absolutely no reason for the consignee himself to believe that at least the few articles that had been removed from one of the bales would be delivered to him.

In those circumstances his Lordship held that the date on which the goods ought to have been delivered must be taken to be the date when the major part of the consignment was delivered or the date when open delivery was taken by the consignee and the period of limitation would run from those dates, and if the period of limitation is so computed from either of the above dates, the suit was clearly beyond time under Article 31 of the Limitation Act and as such, the suit was barred by limitation.

His Lordship further observed that that case before his Lordship was similar to the case decided in *Gajanand Rajgoria and Another Vs. Union of India (UOI)*, . His Lordship, however, followed the earlier Bench decision of this Court in *Gopi Ram Gouri Shankar Vs. G.I.P. Ry. Co.*, and observed, as stated above, that the plaintiff before his Lordship did not say that he was expecting delivery of the missing articles from the railway; on the contrary, he took them as lost and made a final claim upon the railway for recovery of price of the missing articles together with incidental costs.

19. Mr. Bose relied very strongly on the above case, because, there, as here, the plaintiff, so ran his argument, took the articles as lost, and, therefore, made a final claim upon the railway for the recovery of the price of the missing goods. Prima facie the above case does support the contention of Mr. Bose. In my opinion, however, the facts of that case and those of the present case are not the same. The only similarity in the two cases is that there, as here, only a claim for compensation was made, and, no demand for delivery of the goods was made.

But the circumstances in which the claim for compensation was made there, and

here, are entirely different and that fact distinguishes that case from the present case. In the present case there was a complete non-delivery of the entire 120 bags of linseed, whereas in the case decided by Kanhaiya Singh J. there was short delivery, in that, out of 37 bales 35 bales were delivered and out of the missing two bales which were not delivered on the 8th January, 1948, one was found to be missing on the 20th January, 1948, when open delivery was taken, and, some articles were found to have been removed from the other bale.

In view of these peculiar circumstances of that case, his Lordship held that the date when the major part of the consignment was delivered, or the date when open delivery was taken by the consignee must be taken to be the date when the period of limitation commenced running. His Lordship further observed, in view of the above peculiar circumstances of that case, that

"there is no question of giving the plaintiff a hope that the missing goods would be delivered to the plaintiff. As a matter of fact, there was absolutely no reason for the plaintiff to believe that at least the few articles that had been removed from one of the bales would be delivered to the plaintiff."

In my opinion, therefore, that case cannot govern, the case under consideration here.

20. Mr. Bose also relied, in his further reply, on a decision of C.P. Sinha, J., in *Jwala Datt Gobind Ram Vs. Union of India(UOI) and Others*, . That was not a case of non-delivery, but a case of short delivery. The consignment consisted in that case of 700 tins of ground nut oil, out of which at the time of delivery on the 28th October, 1942, it was found that 175 tins were badly damaged and were altogether empty. In that case Article 30 of the Limitation Act was applied.

Some of the cases relied upon now were also considered by his Lordship and distinguished on the ground that those cases were cases of non-delivery. His Lordship, however, doubted the correctness of the Bench decision of this Court in (*Gopi Ram Gouri Shankar Vs. G.I.P. Ry. Co.*, to the effect that where the major part of consignment had been delivered, the balance of the consignment ought to be deemed to have been delivered on the very day and limitation would start running from the day when the major portion of the consignment was delivered.

21. His Lordship, C.P. Sinha, J., while considering the decision in *Gopi Ram Gouri Shankar Vs. G.I.P. Ry. Co.*, , in which five bags of flour out of 250 bags were not delivered observed:

"If 5 bags were not delivered, the reason of non-delivery may be more than one. The 5 bags may have been mis-delivered, or they may have been mis-directed, or they might not have been despatched along with the major portion of the consignment and might still be with the carrier. In such a case, the railway company concerned had to trace out the non-delivered 5 bags of flour, and the date of refusal by the railway company either to deliver the non-delivered 5 bags or to state that the 5 bags were lost, would ordinarily be the date from which the

time would run under Article 31 of the Limitation Act."

22. I respectfully agree to the above observations of his Lordship Sinha, J. In my opinion also the principle laid down in Gopi Ram Gouri Shankar Vs. G.I.P. Ry. Co., seems, to have been very broadly stated, because it cannot be laid down as a cut and dried formula of universal application to all cases, irrespective of the facts of that particular case, that in every case where the major part of a consignment has been delivered the balance of the consignment ought to be deemed to have been delivered on that very date. Each case will depend on the facts and circumstances of that particular case,

23. From an examination of the cases cited by Mr. Bose, therefore, it will appear that in all of them, except in the last but one, decided by Kanhaiya Singh, J. a demand for delivery of the goods was made.

24. I shall now notice some of the cases relied upon by Mr. Sinha in support of his appeal.

23. I have already dealt with Bengal and North Western Ry. Co. Ltd. Vs. Kameshwar Singh Bahadur, which also was a case of short delivery. I shall deal with it again in some detail as in that case also only a claim for compensation was made. In that case on the 27th August, 1922 a consignment of 3,229 bundles of round steel rods weighing 851 maunds and also four Wooden frames were despatched from a certain railway station. The delivery was made in three instalments on the 14th September, 1922, 20th September, 1922 and 21st September, 1922. It was found that there was a shortage of 248 maunds and further the wooden frames were delivered by road van on the 5th October, 1922.

There was thereafter correspondence between the plaintiff of that suit and the railway Company. While considering the defence that the plaintiff's suit was barred by limitation, Courtney-Terrell, C.J. with whom Fazl Ali, J. agreed, at page 76, (of ILR Pat): (at P. 48 of AIR) before making the observations already quoted before, earlier observed:

"Reference may be had to the contract for carriage for the purpose of determining the date when the goods ought to have been delivered. If no particular date is specified it must be determined as a matter of what is reasonable having regard to the circumstances of the contract, and this criterion must be applied as much in favour of the plaintiff as in favour of the defendant.

Now the contract referred not only to the delivery of iron but also to the delivery of the four wooden frames. It was a single contract in respect of a single consignment and the plaintiff might reasonably take the point of view that until the entire contract purported to have been fulfilled he was not in a position to complain of non-delivery of a part of the goods subject to the contract. As I have said, the wooden frames were delivered by road van on the 5th October, and the suit was begun on the 4th October in the following year and is, therefore, in time."

26. Their Lordships took the view that the contract which their Lordships were considering was a single contract in respect of a single consignment and the plaintiff might reasonably take the view that until the entire contract purported to have been fulfilled he was not in a position to complain of non-delivery of a part of the goods subject to the contract.

Their Lordships, therefore, held that the plaintiff's suit begun on the 4th October, 1923 was not barred, not only because it was filed within one year from the 5th October, 1922, when the wooden frames, which were part of the contract, were delivered by road van, but also because the plaintiff wrote to the railway company on the 23rd October, 1922 claiming compensation for non-delivery, and, in view of the attitude of the railway in that case as reflected in its last letter of the 4th August, 1928, regretting inability to do anything in that matter, the time should commence to run from the date when the plaintiff got the final reply from the railway. It may, however, be mentioned that in that case the point which is now raised was not debated.

27. In other cases relied upon by Mr. Sinha, such as (i) *The Governor-General in Council Vs. Kasiram Marwari*, which was a case of non-delivery; (ii) *Union of India (UOI) Vs. Bansidhar Modi*, which also was a case of short delivery, and (iii) *Mutsaddi Lal Vs. Government-General in Council*, which too was a case of short delivery a demand delivery of the goods was made but the railway authorities failed to make delivery of the same. These cases, therefore, are not helpful for the decision of the point in controversy.

28. The case, however, of *The Governor-General in Council Vs. Khadi Mandal*, also relied upon by Mr. Sinha is of some importance, because that was also a case of non-delivery, and, when the goods had not been delivered to the plaintiff of that suit correspondence started between the plaintiff and the railway and the substance of this correspondence was that the plaintiff had been writing to the railway defendant for the payment of the compensation amount, but the railway defendant was putting off the plaintiff's claim by saying that the matter was under consideration. Govind Menon J. as he then was observed:

"Though defendant I knew as early as 20th September, 1944 that the goods were lost, the information to that effect was not passed on to the plaintiff and finally it was only on the 20th September 1945 the plaintiff was informed of defendant's inability to deliver the goods as per Ext. P-2. This date should be taken as the crucial date on which the impossibility of performance of the contract was made known to the plaintiff,"

29. The suit in that case was filed on the 1st August, 1946. His Lordship considering the consensus of authorities of the Madras High Court held that the suit was not barred by limitation, Mr. Sinha relied on this case because in that case also there was no request by the plaintiff of that suit demanding for delivery of the non-delivered goods, but his demand was for payment of the price of the non-delivered goods.

He, therefore, submitted that even then, just as the case is here, it was held that the starting point of limitation under Article 31 of the Limitation Act would be the date when the railway company, finally says that the goods cannot be delivered. But the point before us was not really raised.

30. After a review of the authorities cited at the Bar, I, therefore, find that there are only three cases -- Shamburam Agarwala Vs. Union of India (UOI), , The Governor-General in Council Vs. Khadi Mandal, and Bengal and North Western Ry. Co. Ltd. Vs. Kameshwar Singh Bahadur, in which there was no demand for delivery of the non-delivered goods and in which only a claim for compensation for the non-delivered goods had been made.

But as I have shown before, in none of these cases the facts were similar to those of the present case and in none of them, except in Shamburam Agarwala Vs. Union of India (UOI), the point, which arises now, arose for decision specifically. In Shamburam Agarwala Vs. Union of India (UOI), although the point arose but on entirely different set of facts and circumstances.

31. But to me it appears that some guidance can be had from Bengal and North Western Ry. Co. Ltd. Vs. Kameshwar Singh Bahadur, and The Governor-General in Council Vs. Khadi Mandal, . I feel very much impressed, if I may say with respect, with the reasonings of their Lordships in these cases, and I do not find any reason why they should not be adopted in the instant case.

32. In my judgment in order to apply Article 31 of the Limitation Act, the question as to when the goods ought to be delivered," within the meaning of Article 31 of the Limitation Act, has to be decided on the facts and circumstances of each case. Even in the case of non-delivery of goods it cannot be laid down as a universal rule that time would begin to run from that date when the consignment which ought to have been delivered was not delivered at all.

If after non-delivery of the goods the plaintiff does not make a demand for delivery of the goods, but makes a claim of compensation for the goods, in accordance with Section 77 of the Railways Act, it cannot be said that because the plaintiff had made no demand for delivery of the non-delivered goods but only a claim for compensation, which resulted in the lone and protracted correspondence between him and the railway authorities, ending ultimately in the railway expressing its inability to accede to the claim of the plaintiff, limitation should run not from the date when the railway finally refused to accept the claim of the plaintiff, but from the date when the goods in the ordinary course ought to have been delivered.

If, therefore, the plaintiff in the case of non-delivery of the entire consignment makes a claim for compensation, which leads to a correspondence between the plaintiff and the railway, the substance of which is that the plaintiffs' claim is put off by the railway by saying repeatedly at first that the matter was receiving attention, and, thereafter by informing the plaintiff that enquiries are under progress and that the railway authority will let the plaintiff hear finally shortly,

but no such final reply or Information is given to the plaintiff thereafter, the plaintiff is justified in waiting to brine his suit for a reasonable time, and, if he brings his suit within one year from the last letter of the railway, the plaintiffs' suit will be within time under Article 31.

Under Section 9, Limitation Act, where once time has begun to run, no subsequent disability or inability to sue stops it. In such a case, therefore, time would begin to run against the plaintiff from the last letter of the railway holding out hopes, but not actually complying with its promise to inform the plaintiff finally about the result of its enquiry or the like. Therefore, in the case of non-delivery of the entire consignments, even if only a claim for compensation is made, and no demand for delivery of the goods is made, the expression "when the goods ought to be delivered" occurring in Article 31 must be construed as meaning either when the defendant railway finally refused to pay the plaintiffs' claim or when it held out final hopes and promised to inform the plaintiff finally shortly, but did not do so thereafter.

33. For these considerations, I am unable to accept the argument of Mr, Bose, although I must confess it is attractive, that because the plaintiff did not ask the railway For delivery of the goods but he made only a claim for compensation, the correspondence which ensued on such a matter between him and the railways should not be taken into consideration because Article 31 speaks of "when the goods ought to be delivered"" and not "when the claim is refused".

It is true that while making a claim u/s 77 of the Railways Act for the payment of the compensation the plaintiff had taken the goods as lost, but on such a claim being made it was the duty of the railway, which was not only in a better position, but rather the only person in the position to say whether there was any chance of the lost goods being recovered and found out, to inform the plaintiff that an enquiry was being made about the loss of the goods, and, that it was likely that as a result of the enquiry the goods may be delivered to the plaintiff and, therefore, the question of payment of compensation may await or did not arise until the completion of its enquiry.

In the present case the usual and stereo-typed reply sent by the railway authorities was, as will appear from Exhibits 5(a), 5 and 5(b), that the matter was receiving attention. In the last letter of 14-2-1949 (Exhibit 5/c), the Chief Commercial Manager, E. I. Railway, informed the plaintiff under item 4 also in it that "Enquiries" are under progress and I shall let you hear finally."

The last letter would certainly create a hope in any person that an enquiry about the lost goods was being made, and therefore, it may be that the lost goods may be delivered to him. The plaintiffs as such were justified in waiting for the final reply of the railway and after having waited for six months for the railways' reply, which it was promised in exhibit 5(c), sent a notice u/s 80, Civil Procedure Code, -- exhibit 3 -- on 20-8-1949, and thereafter as a last resort brought the present suit on 22-11-1949.

In these circumstances, taking all the facts and circumstances of the present case into consideration, it appears to me that, in the present case, time, under Article 31 of the Limitation Act, began to run from 14-2-1949, when the defendant informed the plaintiffs that the defendant shall let the plaintiffs hear finally shortly, but actually the plaintiffs never heard anything more from the defendant thereafter.

The defendant by a deliberate process of ignoring the plaintiffs' claim and repeated requests for attention to their claim for compensation misled them into delaying their suit and therefore it is not open to the defendant now to contend that the suit has been brought too late. The attitude of the defendant has throughout been lacking in candour and its defence to this suit has also no merit. The plea of limitation must accordingly be overruled.

34. Mr. Bose then submitted that if the above be the view of the case, then the plaintiffs' suit was premature, because the final reply has not been received from the defendant. I do not think there is any substance in this contention because the correspondence was going on between the plaintiffs and the railway from 2-12-1948, when they sent the notice required u/s 77 of the Indian Railways Act, and, therefore, it was not expected of the plaintiffs that they would have waited indefinitely for the reply from the railway.

In these circumstances the plaintiffs' suit cannot be said to be premature either. The defendant had ample and reasonable opportunity of fulfilling the terms of the contract but it deliberately failed to do so.

35. The learned Subordinate Judge, in my opinion, has taken a wrong view of Article 31 in thinking that the period of Limitation under Article 31 of the Limitation Act began to run from the end of June, 1948, when on the evidence of P. W. 1 the usual time taken in the transit of consignment from Samastipur to Lilloah is about 15 to 20 days and, therefore, the consignment in question ought to have been delivered in normal course by the end of June, 1948. I, therefore, hold, in disagreement-with the court below, that the plaintiffs' suit is not barred by limitation under Article 31, Limitation Act.

36. The Court below has already found that if the plaintiff's suit is not barred by limitation, then the defendant railway would be liable for the loss sustained by the plaintiffs. This finding has not been challenged by Mr. Bose before me. In these circumstances, the plaintiffs' suit must be decreed.

37. There is, however, one small point, which was raised by Mr. Bose regarding the plaintiffs' claim for interest from 12-6-1948 to 22-11-1949, the date of the institution of suit, at Re. 1 per cent per mensem on Rs. 6006/- the price of 273 maunds of linseed contained in 120 bags including the price of 120 bags, which, according to the plaintiffs' calculation, came to Rs. 6006/-.

The court below has allowed interest u/s 1 of the Interest Act. I do not think the plaintiffs are entitled to any interest even under the Interest Act. As held by the

Privy Council in AIR 1938 67 (Privy Council) interest can be allowed under the Interest Act, 32 of 1839, only if the amount claimed is a sum certain which is payable at a certain time by virtue of a written instrument according to the contract of the parties. In the present case it cannot be said that the amount claimed is a sum certain, because the plaintiff calculated the price at a certain rate which was challenged by the defendant, and, therefore, that had to be established by the plaintiffs.

The defendant also contested the plaintiffs claim for interest. In these circumstances, I would set aside the order of the court below granting interest to the plaintiffs for the period prior to the institution of the suit.

38. In the result, the appeal succeeds. The judgment and decree of the court below are set aside and the plaintiffs' suit is decreed for Rs. 6006/-, which is the price of the goods not delivered, plus Rs. 100/- as cost, total Rs. 6106/- only. The plaintiffs will not get any interest post the institution of the suit, but they will get interest pendente lite on this principal sum at 6 per cent per annum, besides future interest on the amount decreed at the same rate from the date of the decree until realisation. The plaintiffs will get costs of this Court as well as of the court below.