
(1959) 10 PAT CK 0012
In the Patna High Court
Case No : Civil Revision No. 86 of 1957

Makhanlal Harnarain

APPELLANT

Vs

Union of India(UOI)

RESPONDENT

Date of Decision : 01-10-1959

Acts Referred:

Railways Act, 1890 — Section 77

Citation : AIR 1960 Patna 150

Hon'ble Judges : Untwalia, J

Bench : Single Bench

Advocate : R.S. Chatterjee, for the Appellant; P.K. Bose, for the Respondent

Final Decision : Allowed

Judgement

Untwalia, J.—The petitioner, a firm registered under the Indian Partnership Act, filed a small cause Court suit against the Union of India owning and representing South Eastern and Southern Railways for recovery of compensation for short delivery of thirteen maunds twelve seers of rice out of a consignment of 181 bags, the total weight of which was 497 maunds 30 seers. The consignment was booked on 17-6-55 from Nuzvid, a railway station on the Southern Railway to Bhaga, a railway station which was at the relevant time on the Eastern Railway but is now on the South Eastern Railway. According to the plaintiff's case at the time of delivery 7 bags were found torn and slack and an open delivery of the consignment was given to the plaintiff on 8-7-55. The delivery was short by the quantity of rice mentioned above. The plaintiff further alleged that it suffered a loss of Rs. 196/3/- being the price of the said rice, that the said loss was due to the wilful negligence, misconduct, and want of proper care on the part of the defendant's railways and their servants and that the defendant was responsible and liable for the said loss of the plaintiff.

2. The suit was contested by the defendant on grounds, inter alia, that it was bad for want of proper notice u/s 77 of the Railways Act and Section 80 of the Code of Civil Procedure. It was denied that the loss to the plaintiff was due to the

negligence and misconduct of the defendant.

3. Learned Munsif of Dhanbad who tried the suit as a Small Cause Court Judge has observed-

"The booking of the consignment as also the shortage are not disputed."

He further observed dealing with the evidence of D. W. 1 that-

". . . the commercial clerk of the destination station (D. W. 1) has admitted that the shortage was on account of 7 bags having been found torn and slack. He is unable to say how the consignment in question was dealt with during .transit. No evidence, whatsoever, has been led as to how the consignment in question was handled while in transit though the plaintiff has asked the defendant to make disclosures through the petition filed on 10-11-56.I, therefore, feel no hesitation in holding that the defendant is liable to pay compensation in this suit.'"

He has further held that the notices u/s 80, the CPC have been served upon the General Managers of the Eastern and Southern Railways but the notice u/s 77 of the Indian Railways Act was served on the Chief Commercial Superintendent of the Eastern Railway only and no notice was served upon any officer of the Southern Railway on which railway the despatching station was. This, in, the opinion of the learned Small Cause Court Judge, was fatal to the suit as it could not be proved that the Eastern Railway was responsible for the short delivery of the goods. In that view of the matter, the suit has been dismissed by the learned Small Cause Court Judge, and the petitioner firm has filed this revision u/s 25 of the Small Cause Courts Act.

4. In my opinion, the learned Small Cause Court Judge has taken a wrong view of the law in regard to the non-service of notice u/s 77 of the Railways Act. It is a well settled view of this court as also of many other High Courts. In India that no notice under said provision of law is necessary in a case of Dominion of India Vs. Hazari Lal and Another, , Governor General in Council and Others Vs. Mahabir Ram and Another, and Babu Lal Vs. The Dominion of India, . It is equally well settled that, if the claim: is, for compensation on account of non-delivery of goods which have either been admitted by the plaintiff to have been lost by the Railway or have been proved to be so: by it, the notice is imperative and the suit would fail for want of notice u/s 77. Mr. P.K. Bose, learned Advocate for the Railway, vehemently contended before me that the present suit is of a kind to which would apply the latter principle of law just enunciated by me. He submitted that the plaintiff has admitted loss of the goods in the plaint as well as in evidence and, therefore, the suit must be held to be bad for want of notice u/s 77 of the Railways Act to the Southern Railway in as much, as the plaintiff neither alleged nor has it established the loss of the goods from the custody of the Eastern Railway. I am unable to accept this contention. It is necessary to quote here the first three paragraphs of the plaint which are relevant for the purposes of the point under consideration:

"1. That one consignment of 181 bags of rice weighing 497 mds. and 30 seers was booked by Sree Seetharama Rice and G.N. Oil Mills for the plaintiff under Invoice No. 5R/R No. 859271 dated 17/6/1955 Ex. Nuzvid to Bhaga.

2. That on taking open delivery of the said consignment at the destination seven bags were found torn and slack and delivery short by 13 maunds and 12 seers of rice was given to the plaintiff on 8/7/55 and a certificate of shortage has been granted to the plaintiff accordingly.

3. That the plaintiff thus suffered a loss of Rs. 196-3-0 being the value of the said rice. The said loss is due to the wilful negligence, misconduct and want of proper care on the part of the defendant's Railways and their servants and the defendant is responsible and liable for the said loss of the plaintiff who is entitled to get the same from the defendant."

It is equally necessary to quote the first three paragraphs of the written statement of the defendant, which paragraphs only are relevant for the point at issue:

"1. That the plaintiff has no cause of action for the present suit,

2. That the suit is bad for want of proper notice u/s 77 of the I. R. Act and Section 80 of the C. P. Code.

3. This defendant denies the statement contained in para 2 of the plaint. This defendant denies that the loss was due to the negligence or misconduct of the defendant."

It is clear to me on a plain reading of this plaint that the plaintiff's case is a case of non-delivery. The plaintiff's firm has pleaded that at the destination 7 bags were found torn and slack and 13 maunds 12 seers of rice were delivered short, that is to say, were not delivered, that resulted in a loss to the plaintiff to the extent of Rs. 196/3/-and the said loss was due to wilful negligence, misconduct and want of proper care on the part of defendant's railways. It is nowhere admitted in the plaint that the quantity which was delivered short was lost from the custody of the railway. The short delivery of a part of the consignment in this case may be due to several factors, and unless the railway pleaded and proved loss of the goods from its custody it cannot be said that it was a case of "loss" and not a case of "non-delivery." It is important to note that nowhere in the written statement the railway has pleaded that it could not deliver the quantity of rice delivered short to the plaintiff as it was lost from the custody of the railway. The assertion in the third paragraph of the written statement to the effect that the loss was not due to the negligence or misconduct of the defendant is clearly referable to the third paragraph of the plaint where the loss pleaded is a loss to the plaintiff and not loss to the goods. It is well settled and not disputed also by Mr. Bose that "loss" means the loss by the railway and not loss to the owner of the goods.

5. Mr. Bose submitted that in cases where the whole of the package either being

the whole consignment or forming a part of it is not delivered, it may be a case of non-delivery unless loss of package is pleaded and shown by the railway administration but where a package is "delivered wherein some quantity is found short on open delivery, it is necessarily case of "loss" and can never be a case of "non-delivery," I am unable to accept this argument. In my opinion, if a part of the consignment is not delivered, it is prima "facie a case of non-delivery irrespective of the question whether the part not delivered is a full package or is a part of it which in its turn, forms a part or the full consignment. There is no warrant for making a distinction in the two types of cases. It has been observed in the Allahabad Full Bench case of Governor General in Council and Others Vs. Mahabir Ram and Another, :

"Non-delivery of goods may be due to a variety of causes e. g., (1) Loss of the goods by the carrier, that is to say loss owing to the acts (such as theft and robbery) (2) Deterioration owing to natural causes (3) Destruction owing to natural causes such as flood or artificial causes e. g. incendiarism. (4) Conversion. (5) Detention e. g, where there is dispute about wharfage and the railway administration wrongfully detains the goods. (6) Misdelivery either by honest mistake or on account of fraud (7) capricious act of the railway employees e. g. the goods even on arrival at the destination are not delivered to the owner without any rhyme or reason (8) Wrongful sale of goods, e. g. where the railway administration wrongfully sells the goods on arrival at the destination.

I am of the opinion that where non-delivery of goods is due to loss of goods by the railway administration or to their deterioration or destruction then only a notice u/s 77, Railways Act is necessary but where non-delivery of goods is due to any other reason then no such notice is required."

It would be noticed that most of the other reasons of non-delivery which are applicable to the case of non-delivery of a full package may be applicable to a case of a non-delivery of a part of the package. It may well be that it may be easy for the railway to show and prove loss on the part of a consignment not delivered when it forms part of a package and it may be somewhat more onerous to prove loss when the non-delivery concerns a whole package. But that, in my opinion, is no ground for taking the view that in all cases of nondelivery of a part of the consignment when it forms part of a package it must be held that the quantity not delivered has been lost by the railway. I may in this connection also observe that when the goods are booked at railway risk, it is for the railway to establish that the quantity of goods not delivered has been lost by it in spite of its having taken as much care of the goods as a man of ordinary prudence would have taken.

This would be so irrespective of the question as to whether the goods not delivered consist of one full package or part of the package. If the goods are booked at owner's risk rate as provided u/s 74C of the Railways Act, the provisions of Section 74D are attracted and the railway administration shall be bound to disclose to the consignor how the consignment or package was dealt

with throughout the time it was in its possession or control irrespective of the question whether the consignment not delivered is the whole consignment or the whole of any package forming part of a consignment or whether the package delivered had been pilfered in transit. In either event it would be open to the plaintiff to show that negligence or misconduct on the part of the railway administration can be fairly inferred from such disclosure in order to entitle the plaintiff to claim compensation for the loss, destruction, deterioration or damage to the consignment or its part. That being so, I am inclined to think that both types of cases are on the same footing if the railway does not succeed in showing or proving loss of the part of a consignment.

This view of mine finds support from the Full Bench case of the Patna High Court in *Dominion of India Vs. Hazari Lal and Another*, . It would be noticed that in that case the suit of the plaintiff was for recovery of compensation of non-delivery of a portion of 2 consignments of thalis and lotas booked from Bankura station on B.N. Railway to Nirmali on the O.T. Railway. The plaintiff had taken open delivery and a package of the thalis, and the lotas was found evidently due to pilferage on route. Meredith, J. as he then was, referred the case for consideration by the Full Bench on the question whether the word "loss" in Section 77 means only actual loss of the goods or will include loss to the plaintiff owing to failure to deliver. The plaintiff had alleged in the plaint of that case that the goods had been lost owing to negligence on the part of the servants of the defendant Company and in that situation it was held that admittedly that was a case of loss of the goods by the railway. It would not appear from the judgment of any of the learned Judges who constituted the Full Bench that the case was held to be a case of loss of the goods simply because the quantity short delivered formed part of a package of thalis and lotas.

6. Mr. Bose, in support of this argument that in view of the pleadings of the parties in this case as also in view of the fact that the quantity of rice short delivered formed part of some bags of rice, that is to say some packages and, therefore, necessarily it was a case of loss of the goods by the railway referred to 5 unreported decisions of this court as also to a few reported ones. But in my opinion none of these cases help him. None of them has taken the latter view, canvassed by Mr. Bose, and in regard to the construction of the pleadings the unreported cases cited before me are distinguishable.

7. The first unreported case in point of time of decision is Civil Revision No. 110 of 1950, decided by B.P. Sinha as he then was, on 10-8-1950. In this case the point was neither canvassed nor decided. It was a case of short delivery and it was held that the suit was bad for want of notice in time u/s 77 of the Railways Act. The point as to whether, on the facts and in the circumstances of that case, it was one of "non-delivery" or "loss" and whether a notice u/s 77 was necessary if it was former was not mooted at all either on pleadings, or on any other ground.

8. The next case is Civil Revision Nos. 295 to 298 of 1950 decided by

Ramaswami J. as he then was on 6-4-1951. In the plaints of all the four small cause courts suits which gave rise to these four civil revisions it was stated that some bales forming part of the consignments had been tampered with and some pairs of dhoties or some yards of cloth had been removed and that this has occurred during the course of transit, in view of these statements in the plaints, it was held-

"Upon these facts it is manifest that the suits did not relate to a case of mere short delivery but the allegation was that a part of the consignment had been lost by the railway company while carrying the consignment from the point of loading to the point of unloading."

In my opinion, there are no such words in the plaint of the instant case.

9. The third case is a decision of Narayan, J. in S.A. 1174 of 1949 decided on 16-3-1954. In that case it was not argued on behalf of the plaintiff-appellant that that was not a case of loss but the learned Judge dealt with this point as it found mention in the grounds of appeal. In the third paragraph of the plaint it was stated that the bales were found short in several pounds and in paragraph 4 it was said that the plaintiff had suffered a loss of Rs. 1303/5/3. The view taken was that-

"The word 'loss' has been used in Section 77, and the expression has not to be given a narrow meaning."

I respectfully differ from this view of the law, as expressed by Narayan J. in that case. This is not in consonance with the well settled view of this court, as it has given a narrow meaning of the word "loss." On the wording of that plaint, I venture to observe with very great respect that that was not a case of loss of goods by the railway.

10. The next case is Civil Revn. No. 544 of 195S decided by R.K. Choudhury J. on 29-4-1954. On similar wordings of the plaint as in the case of S. A. 1174 of 1949 and following that decision, it has been held that the plaintiff based their claim in the plaint on the loss of the articles and not on non-delivery for the reasons stated above, this case is also distinguishable.

11. The last unreported case is the decision of Raj Kishore Prasad J. dated 10-7-1958, in F. A. No. 452 of 1951. I find no observation in the judgment of that case on the point which has been mooted in the instant case,

12. Mr. Bose relied upon a judgment of C.P. Sinha, J. as he then was, in *Jwala Datt Gobind Ram Vs. Union of India(UOI) and Others*, . In that case the question was as to what would be the starting, point of limitation of a case where the goods had been short delivered. On the facts and in the circumstances of that case it was held that limitation started under Article 30 of the Limitation Act at least from the date when 700 tins had been delivered at Ranchi. It would be pertinent to quote a passage from the judgment which lends support to the view which I have expressed -

"Even in cases of short delivery, the question of non-delivery may be involved but I do not like to deal with the matter any further because it is not necessary to do so to dispose of the present case."

Reliance was also placed on *G.I.P. Ry. Co. Vs. Gopi Ram Gouri Sankar*, . In my opinion although that is a case of non-delivery of one out of the 4 bales of cloth, the principles, decided there are very much applicable to the facts of the instant case and instead of supporting the contention of Mr. Bose this case helps the petitioner. Reliance was placed also on *Gajanand Rajgoria and Another Vs. Union of India (UOI)*, . That was again a case dealing with the question of Articles 30 and 31 of the Limitation Act. Out of a consignment of 200 bags of Sugar 8 bags were found cut and damaged.

There was a short delivery of about 11 maunds of sugar, The plaintiff took delivery of 200 bags of sugar on 5-4-1950. On the facts and in the circumstances of that case, it was held that the limitation began to run from that date. The question as to which of the two articles namely, Articles 30 and 31, was applicable, was not decided. I would, however, quote a passage from this decision, which in my opinion, again lends support to my view.

"I apprehend that short delivery may, in certain circumstances, be due to the loss of part of the goods, in certain other circumstances, short delivery may be due to non-delivery of part of goods, particularly when the consignment consists of several units and the units are delivered piecemeal and I do not think that it can be laid down as a rule of law that every case of short delivery of goods must come within Article 30 or within Article 31. As I have already said whether Article 30 Or Article 31 will apply will depend on the facts of each case."

The last reported case cited is *Union of India v. Fatah Alam*, 1958 BLJR 615. It was a case of short delivery of 23 baskets of Mangoes out of a consignment of 276 baskets. The point decided was entirely a different one and I do not find any observation in that case which may lend support to the argument advanced on behalf of the railway.

13. Mr. P.K. Bose referred to the deposition of P.W. 1 where he stated that the theft occurred at Bhaga station and submitted that this showed that the loss of the goods was admitted in evidence. But that statement was made in an endeavour to fasten the liability on- the head of Eastern Railway and the learned Small Cause Court Judge has rightly remarked that P.W. 1 had not seen the theft nor was he in a position to say anything from his personal knowledge. In that view of the matter, that evidence was hearsay and cannot be relied upon and looked into for the purposes of showing that the loss in this case was admitted.

14. My considered opinion in this case, therefore, is that the Judgment of the learned Small Cause Court Judge is not in accordance with law. The plaintiff's suit was a suit claiming compensation on account of loss caused to the plaintiff by the non-delivery or short delivery of 13 maunds 12 seers of rice. Loss of this quantity of rice by the Railway administration was neither admitted in the plaint

nor was it pleaded by the Railway in its written statement, nor was there any legal evidence on the record to indicate even faintly as to what happened to this quantity of rice. In that situation it must be held that no notice u/s 77 of the Railways Act was necessary in this case.

The suit therefore, must be decreed against the Union of India owning and representing the southern Railway although it cannot be decreed against the Union of India owning and representing the South Eastern Railway (successor to Eastern Railway so far as the destination station is concerned.) The learned Small Cause Court Judge has found that he would allow the claim of Rs. 14/-per maund and not Rs. 14/12/- per maund as claimed by the plaintiff. According to that finding the plaintiff would be entitled to a decree for a sum of Rs. 186/3/- on account of the price of 13 maunds 12 seers of rice.

15. In the result, this civil revision application is allowed with costs, hearing fee Rs. 16/-. The plaintiff's suit is decreed for a sum of Rs. 186/3/- with proportionate costs of the court below hearing fee Rs. 16/- and also with interest pendente lite from the date of institution of the suit till realisation at six per cent per annum.