

(1957) 08 AHC CK 0017
In the Allahabad High Court
Case No : First Appeal No. 501 of 1945

Oudh and Tirhut Railway

APPELLANT

Vs

Mrs. Karam Chand Paras Ram

RESPONDENT

Date of Decision : 14-08-1957

Acts Referred:

Limitation Act, 1908 — Article 30, 31
Railways Act, 1890 — Section 72, 77

Citation : AIR 1958 All 234

Hon'ble Judges : Mukerji, J;Desai, J;Beg, J

Bench : Full Bench

Advocate : Brijlal Gupta, for the Appellant; Satish Chandra and Bishambhar Dayal, for the Respondent

Final Decision : Dismissed

Judgement

Desai, J.—This is a defendant's appeal from a decree of the Judge, Small Cause Court, Meerut, for Rs. 5,135/11/- on account of damages for loss of goods. On 10-8-1942 a consignment of 37 bales of gunny bags was booked from Jogbani railway station on the Bengal and Assam Railway to Ghaziabad on the East Indian Railway under railway risk note H by the Biratnagar Jute Mills Ltd. The consignee was the Jute Mills Ltd. itself and the railway receipt was assigned by it to the respondent, who thereupon became entitled to take delivery of the goods at Gaziabad.

The consignment was placed in wagon No. 15317 and the train left Jogbani on the the same day and reached Katihar Junction on 11-8-1942. At Katihar the wagon was detached from the train and handed over to the appellant, which was then known as the Bengal North Western Railway, for conveyance to Bara Banki from where it was to be carried by the East Indian Railway to the destination, Ghaziabad. The appellant took charge of the wagon at Katihar on 11-8-1942 and attached it to 163-Up, which left Katihar for Bara Banki, in loaded condition as would appear from the guard's signature book.

Between Katihar and Bara Banki is railway station Barauni under the appellant's administration; the train should have reached Barauni within 15-16 hours of its departure from Katihar. There were political disturbances in August, 1942, and the railway station at Barauni was looted by mobs; the looting started on night of 11-8-1942 and continued for 2-3 days with the result that the traffic through Barauni was suspended from 12-8-1942. It is said that 163-Up reached Baruni on or about 12-8-1942 and was looted there and the consignment in dispute was lost.

The records maintained at the railway station were burnt by a mob and, therefore, nothing could be known when the train reached Barauni, how long it was detained there, what was the condition of the wagon containing the consignment, when it left etc. The consignment never reached Bara Banki, was never handed over to the East Indian Railway and has not been delivered to the respondent.

2. The respondent after waiting for the arrival of the consignment started correspondence with the railway administrations concerned. First it corresponded with the East Indian Railway. On 1-10-1942 it wrote to its Chief Commercial Manager informing him that the consignment had not reached Ghaziabad, that the price of the goods was rising and that if they were not delivered to it within a week, it would hold him responsible for "loss" and claim from him Rs. 6,150/-, the price, plus Rs. 2,000/- as the anticipated profits from sale of the goods and costs.

A copy of it was endorsed by the respondent to the Bengal and Assam Railway, On 9-10-1942 it sent a telegram to the Chief Commercial Manager, East Indian Railway, informing him that the goods had not still reached Ghaziabad and that he should take necessary action. On 29-10-1942 the Chief Commercial Manager informed it, with reference to the telegram, that the matter was under telegraphic inquiries.

On 3-11-1942 the Chief Commercial Manager, Bengal and Assam Railway, informed the respondent that the consignment had been handed over by his administration to the appellant at Katihar and had been despatched from there on 11-8-1942 and asked it to correspond direct with the Chief Commercial Manager, East Indian Railway. This was in reply to the copy of the respondent's letter dated 1-10-1942 endorsed to the Bengal and Assam Railway.

On 17-11-1942 the respondent wrote again to the East Indian Railway and on 24-11-1942 it was informed that the matter was receiving attention. On 17-10-1942, it seems, the respondent wrote another letter to the Bengal and Assam Railway from which it had not received any reply to its letter of 1-10-1942; that letter was answered by the Bengal and Assam Railway on 23-11-1942 it only said that the matter was receiving attention. On 17-11-1942 the respondent wrote a letter to the East Indian Railway and on 24-11-1942 it replied that the matter was receiving attention.

On 25-11-1942 the respondent sent a telegram to the East Indian Railway and the latter replied on 9-12-1942 that the matter was under reference with the foreign railways, that urgent references were made to them and that unless they proved delivery of the consignment to it, it was unable to give any definite reply to the respondent. On 28-11-1942 the respondent wrote a letter to the East Indian Railway, which replied on 4-12-1942 that the matter was receiving attention.

On 9-12-1942 the respondent, who had by then received the Bengal and Assam Railway's reply dated 3-11-1942, wrote to the East Indian Railway that the consignment had been handed over to the appellant at Katihar and had been despatched from there on 11-8-1942, that it. had not still reached Ghaziabad and that nothing was known about its whereabouts and asked it to arrange at once for its delivery or payment of Rs. 8,150/- as claimed previously.

On 11-12-1942 it sent a telegram to the East Indian Railway asking for information about its consignment and confirmed it by a letter. On 14-12-1942 the respondent addressed the first letter to the appellant's Commercial Manager stating that the consignment ought to have reached the destination within a week in due course, that its whereabouts were not known, that the Bengal and Assam Railway had informed it that the consignment had been delivered to the appellant at Katihar and had been despatched from there on 11-8-1942 and that the East Indian Railway had informed it that the foreign railway had not proved delivery of the consignment to it and requesting the appellant to let it know by return post whether it had handed over the consignment to the East Indian Railway or not.

The East Indian Railway on 23-12-1942 informed the respondent, with reference to its letter & telegram of 11-12-1942, that the matter was under telegraphic communication with the foreign railways. On 12-1-1943 it informed the respondent that the consignment had been looted by a mob during the political disturbances of August, 1942, and that the incident being beyond its control the claim preferred by it could not be entertained and the loss was regretted.

This was the first information received by the respondent about the loss of the consignment. On 19-1-1943 the appellant also informed it with reference to its letter of 14-12-1942, that the consignment was reported to have been looted by a mob at Barauni railway station during the disturbances of August, 1942, that the matter was still under further investigation and that a further reply would be sent after the facts were satisfactorily ascertained.

On 2-3-1943 the respondent wrote to the appellant, with reference to its letter of 19-1-1943, that it had heard that some of its goods were stored in its lost property office and requested that its representative might be permitted to see them in order to identify them. The appellant replied on 6-3-1943, that it was impossible to connect loose bags bearing no marks with any consignment.

On 31-3-1943. the respondent sent a letter (contents not known) to the

appellant which on 20-4-1943 replied that one lot of gunny bags was received in its lost property office and sold by public auction, that several consignments of gunny bags were looted in the disturbances and that consequently it was not possible to say that any of its bags were in the lot. On 8-6-1943 the respondent wrote again to the appellant seeking some information about the lot and the appellant replied that it was for the respondent to give necessary information about its consignment so that it could say whether the lot contained any of its bags.

The respondent on 13-8-1943 wrote that the total number of bags in its consignment was 12,300. No part of the consignment was delivered to the respondent and on 3-1-1944 it instituted the suit giving rise to this appeal against the appellant and the Governor-General as representing the East Indian Railway and the appellant.

3. It was alleged in the plaint that the consignment should have reached the destination within a week but never reached there and was not delivered to the respondent, that the whole of it was lost, that the loss was the result of misconduct on the part of the railway administration and its servants and they were liable to pay the price of the consignment together with damages for non-delivery in proper time, that notices of the claim and of the suit were served upon the railway administrations and the Governor-General-in-Council, that the East Indian Railway by its letter of 12-1-1943 finally refused to entertain its claim and that the appellant also refused to pay anything as per its letter of 20-4-1943, that the price of the consignment was Rs. 4,599/11/-, that the respondent was in addition entitled to interest at 9 per cent, per annum with effect from 10-8-1942 and that it had relinquished its claim for damages.

Both the defendants contested the suit on similar written statements. The learned Judge has decreed the suit only against the appellant, and therefore, I shall ignore the defence of the Governor-General-in-Council. The appellant pleaded that no claim was made to it as required u/s 77 of the Railways Act within six months from the date of delivery of the consignment at Jogbani, that it was barred by "limitation u/s 80 of the Civil Procedure Code", that section 72 of the Railways Act ex empted the appellant from liability for loss of the goods, that the consignment was looted at Barauni by a riotous mob under circumstances absolutely beyond its control and that there was no misconduct or negligence on its part. The plea of the bar imposed by section 80, C. P. C., was abandoned later. The following issues were framed and decided by the learned Judge:--

""1. Is the suit not maintainable as no claim u/s 77 of the Indian Railways Act (No. IX of 1890) was preferred by the plaintiffs within six months of the date of delivery of the goods for carriage by the railways?

2. * * * * *

3. Is the suit barred by limitation?

4. Whether the goods consigned were looted by a riotous mob in August 1942-at Baroni Junction Railway Station of B. N. Rly. Company, or they were lost on account of the misconduct on the part of the railway administration and its servants; and can any liability for the loss of those goods be fastened on any of the defendants? If so, to what extent?

5. To what relief are the plaintiffs entitled, and against which defendant?"

4. The learned Judge held that it was not proved that the wagon containing the consignment was looted by a mob at Barauni, that the appellant was liable for misconduct, that the letters written by the respondent on 14-12-1942, 19-1-1943 and 2-3-1943 amounted to claims within the meaning of Section 77 and that the respondent was entitled to a decree against the appellant.

5. Risk note H provides that the Railway Administration shall be held harmless and free from all responsibility for any loss or destruction or deterioration of, or damage to, all or any of such consignments from any cause whatsoever except upon proof that such, loss, destruction, deterioration or damage arose from, the misconduct of the Railway Administration's servants, provided that in the case of nondelivery of the whole of a consignment the Railway Administration shall be bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control, and, if necessary, to give evidence thereof before the consignor is called upon to prove misconduct and that if misconduct on the part of the Railway Administration or its servants cannot be fairly inferred from such evidence, the burden of proving it shall lie upon the consignor.

Loss of a consignment is not quite the same thing as non-delivery of it. Whenever a consignment is lost, there cannot possibly be any delivery; the very idea of a consignment being lost is that it cannot be delivered. But nondelivery, though it must result from loss, may also result from other facts, such as wrongful detention, conversion, etc. The word "loss" is used not only in the risk note H but also in Sections 72 to 78, 80, 82, etc. along with the words "destruction" and "deterioration". "Loss or damage" are also used in the Carriers Act (No. 3 of 1865) based on the English Carriers Act (11 George IV & Will IV C. 68). The words used in Section 9 of the Carriers Act are "loss, damage, or non-delivery" suggesting that loss is not synonymous with non-delivery. The words "loss" and "non-delivery" are used also in Articles 30 and 31 of the Indian Limitation Act; under Article 30 a suit against a carrier for compensation for lost goods must be brought within one year from the date when the loss occurs and under Article 31 a suit against a carrier for compensation for non-delivery of goods must be brought within one year from the date when "they ought to be delivered".

These words have no technical meaning; "loss" means that the goods have been lost, i.e., become untraceable and cannot be got hold of, While "non-delivery" simply means that they have not been delivered. If they have not been delivered

on account of their having become untraceable, it is a case of loss rather than of non-delivery. A plaintiff cannot prevent a case of loss from being so simply by pleading non-delivery; at the same time the railway cannot plead that a case of pure nondelivery is a case of loss because as far as the plaintiff is concerned he has lost the goods owing to non-delivery.

Whether the railway is entitled to the protection afforded by Section 72 or the risk note and to the benefit of the provisions of Section 77 depends upon the actual facts and not upon what the plaintiff pleads in the plaint. If a consignment is lost, the plaintiff cannot prevent the railway from claiming the protection of Section 72 or the risk note and the benefit of Section 77 and also from successfully raising the defence of limitation (if the suit is within limitation under Article 31, but not under Article 30) by the simple expediency of pleading a case of non-delivery and the railway is entitled to rely on these provisions in every case of loss, no matter how the plaintiff has stated his case. Of course, if the plaintiff puts forth a case of simple nondelivery, the onus will be upon the railway to plead and prove loss, but (and also, only) on its doing so it would be entitled to the benefit of the provisions.

6. In *Hearn v. L. & S. W. Rly. Co.* (1875) 10 Ex 793: 156 ER 660 (A), the Court had to deal with the meaning of "loss" in Section 1 of 11 George 4 and 1 William 4, C. 68, protecting the railway for liability from loss, unless an increased rate of carriage was paid, a provision similar to Section 75 of our Act. Parke, B., held that "loss" means loss of the article itself.

"In ordinary parlance, this appears to mean, the loss by the carrier of the articles committed to him or injury to them whilst in his care, not the loss sustained by the owner by nondelivery of the article in due time or altogether, or the loss of the use of the article by him" (page 801).

According to him the railway is protected "where the chattel was either abstracted altogether or taken from the place where it ought to be, and incapable of being delivered at the time it ought to be by reason of that sort of loss. The same provision was considered by the Court of Appeal in *Millen v. Brasch & Co.* (1882) 10 QBD 142 (B), the goods booked with a carrier from London to Liverpool and from there to Italy were missent to New York and were not delivered to the plaintiff until seven months later.

Lindley, L. J., held that it was a case of loss, although temporary. He distinguished between non-delivery resulting from loss and nondelivery without loss and held that in the former case the carrier is protected but not in the latter case, which is one of detention. Under the law the carrier would be responsible for detention but not for loss and Lindley, L. J., found it impossible to hold it irresponsible for a loss but responsible for detention caused by the loss. On page 146 he observed:

"The damage to the owner of goods lost is their value, and possibly in some cases further special damage for their non-delivery in proper time. The damage

to the owner of goods never delivered is precisely the same as if they had been lost. The Carriers' Act protects the carrier from liability for loss, and it would simply render the Act nugatory to hold him liable for detention, which is itself the result of the loss for which he is not liable."

On page 147 he observed :

"If goods which ought to be declared and are not declared are lost, whether temporarily or permanently, the carrier is protected from liability for their loss and its consequences."

The goods in the case were held to have been lost and the carrier, not responsible. In *G. A. Jolli v. Dominion of India* AIR 1949 Cal 380 (C), Chatterjee J. said at page 386 that loss must involve loss of possession of the goods by the railway and its being unable to trace them, that proof of non-delivery is by no means conclusive evidence as to loss and that loss means "the disappearance of the goods and there can be no "loss" when the goods are not in fact lost but are actually in existence and are available to the railway for delivery to the consignee". The word "loss" has been explained by a Full Bench of this Court in two recent cases: (1) *Governor General in Council and Others Vs. Mahabir Ram and Another*, and (2) *Mutsaddi Lal Vs. Government-General in Council*, . In the former case it was held that loss means "not loss to the owner but loss by the railway administration" (p. 451 of All LJ): (at p. 896 of AIR), and that

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

In the latter case the plaintiff pleaded simply non-delivery, the railway did not plead loss, destruction or deterioration and it was held that the railway was not protected and reliance was placed upon the former case. McNair J. referring to the condition that "the Company shall not be liable for loss, damage..... except upon proof that the same arose from the wilful misconduct of the Company" in a risk note held that loss "refers to physical loss of the goods and does not cover that form of pecuniary loss which the plaintiffs have suffered from the sale of their goods" by the Company; see *W. Young and Son Ltd. v. British Transport Commission* 1955 2 All ER 98 (F) at page 103.

In the *Governor-General in Council Vs. Lala Debi Sahai*, , the plaintiff claimed damages on a simple case of non-delivery of a consignment and the railway did not allege that it had been lost, destroyed or had deteriorated and it was held by Bennett J., with whom Verma J. agreed, that the railway was not protected by Section 75. The learned Judge pointed out that unless the plaintiff admits or the defendant produces evidence to satisfy the Court that a loss has occurred, the railway is not entitled to rely upon the exemptive provisions of the risk note.

He conceded that loss can be proved By circumstantial evidence, as for example

when from a parcel containing silver bars, one bar was found missing on its reaching the destination. Section 77 was held inapplicable to a case of mere non-delivery in the *The Governor-General of India in Council Vs. G. Krishna Shenoy*, ; Horwill J. held that if the railway in a suit based on mere non-delivery, claimed that it was barred for want of a notice u/s 77, it should show that the consignment had been lost. *Governor-General in Council Vs. Mohammad Badr-i-alam and Another*, , was another case in which the plaintiff pleaded non-delivery and the railway failed to prove loss and it was held not entitled to rely upon Section 75.

In the *Governor-General in Council v. Kasiram Marwari*, AIR 1949 Pat 268 (J) the plaintiff sued for compensation merely for non-delivery of a consignment after he had been informed by the railway that the consignment had been destroyed by mob violence in August, 1942, the railway defended the suit by pleading that the consignment was looted by a violent mob, but the plaintiff did not admit loss in that manner and the railway was held not entitled to a notice u/s 77 before being sued.

The decision proceeded on the basis that mere non-delivery does not constitute loss within the meaning of Section 77; the plaintiff did not admit loss and apparently the railway did not produce any evidence to prove it. In the *Dominion of India Vs. Hazari Lal and Another*, , a Full Bench of the Patna High Court held that a notice u/s 77 was obligatory when the plaintiff stated in his own plaint that the consignment had been lost owing to the negligence of the railway;

"it being so admitted in the plaint that there was a loss of the goods, the onus no longer lies upon the defendant to call evidence on the point which was admitted in the pleadings and, therefore, the case must be treated on the pleadings as one of loss" (Per Meredith J. at page 411).

The suit was framed as for compensation for non-delivery, but this was held to be immaterial. Manohar Lal J. pointed out on the same page that if a suit is based on mere non-delivery but it is proved that the consignment was lost, the suit would fail if no notice u/s 77 had been given. O'Sullivan J. in *Dominion of India Vs. Hazari Lal and Another*, , was inclined to the view that theft of goods from a consignment is not loss but did not proceed on that assumption. He also observed at page 28 that

"in any case in which the carrier has failed to fulfil his obligation under the terms of the contract to deliver the goods, the party aggrieved is entitled to sue for non-delivery."

He did not accept that a cause of action based on non-delivery and not loss could be taken out of the plain terms of Article 31 by subsequent proof by the railway that the goods had been lost. I respectfully disagree because there is no reason to think that the applicability of Sections 72, 77, etc. of the Railways Act is a question of mere pleading by the plaintiff and not of actual facts.

If by lapse of time the plaintiff's remedy for compensation on account of loss has become time-barred, he cannot claim compensation for non-delivery under Article 31. In the case of *Shamsul Huq Vs. Secy. of State*, , Lort-Williams J. said at page 334 that Section 77 has nothing whatever to do with either detention or conversion of which the plaintiff complains and for which he claims compensation; this does not mean that even when the goods are lost, the plaintiff's case would be that of non-delivery.

Mr. Justice Lort-Williams was dealing with a case in which the goods had not been lost but were available for delivery though in a deteriorated condition. In *Duni Chand Ram Saran Das Chopra Vs. Secy. of State and Others*, . the goods were proved to have been lost and the plaintiff's contention that it was a case of non-delivery and not of loss was repelled by Suhrawardy J. The reason given by him, however, was that non-delivery amounts to loss, with which I regret, I cannot agree.

The real reason was that it was a case of loss and not of non-delivery at all. In *The Governor-General in Council Vs. Khadi Mandali*, , the goods were found to have been lost but the plaintiff sued for non-delivery and Govind Menon J, held that the case was governed by Article 31 & not Article 30 of the Limitation Act. There is not much of discussion on this particular question and I am unable to agree. In *Dominion of India Vs. Hazari Lal and Another*, , Mahabir Prasad J. gave the same meaning to the word "loss" in Section 77 as given to it in risk note B.

7. The case before us is undoubtedly a case of loss, and not non-delivery, of the consignment. It is true that the appellant has not led direct evidence to prove the loss. All that has been proved is that the wagon containing the consignment was attached to 163-Up which left Katihar at 3 p.m. on 11-8-1952 and that it did not reach Bara Banki. How far the wagon travelled has not been proved. There is no evidence whatsoever that it reached Barauni; much more less is there any evidence that it was looted by a mob.

A list of wagons looted at the railway station was prepared, but it has not been produced in the Court and there is no evidence that it contained the number of the wagon. It may be presumed from the normal course of events that the wagon reached Barauni on August 11 or 12 when disturbances were taking place there, but it would be a violent presumption that it was looted by a mob.

The records at the railway station might have been destroyed during the violence, but those of neighbouring stations could have been produced to trace the journey of the train. But the failure of the appellant to prove that the consignment was looted by a mob at Barauni is immaterial, because whether it was lost or not was not in controversy, the fact having been admitted by the respondent. It was stated in the plaint itself that the whole consignment had been lost and further that the loss had been caused by misconduct on the part of the railway.

It was pointed out in paragraph 7 that the East Indian Railway and the appellant had failed to account for the loss. Not only did the respondent admit in several paragraphs of the plaint that the consignment had been lost but also that was the information given to it before the institution of the suit. It had been informed, and it accepted without challenging the truth of the information, that the consignment had been looted by a mob during the 1942 August disturbances.

P. W. Devki Nandan deposed that the goods were not delivered to the respondent because the Railways informed it that they had been looted. He did not say that he doubted the truth of the information and admitted that he made no inquiries whether the information was correct or not. He further deposed that on inquiry he learnt that the goods were lost somewhere between Katihar and Barauni; he thus admitted the fact of loss though in slightly different circumstances.

The respondent claimed to have complied with Section 77 by preferring a claim for the loss, and held the railway administrations liable for the loss by attributing misconduct to them. The word "non-delivery" has been used in the plaint at two places, but the suit is not for compensation for non-delivery simpliciter. Nondelivery is mentioned in paragraph 3 only as a statement of fact.

It is mentioned in paragraph 5, but only as giving rise to a cause of action for damages. The respondent held the railways liable not only for the price of the consignment but also for damages for its non-delivery within reasonable time, though subsequently it relinquished the claim for damages. Delivery was mentioned in paragraph 10, because it was to be made at Ghaziabad and the respondent wanted to show that the Court having jurisdiction over Ghaziabad had jurisdiction to try the suit.

There is no reason whatsoever to think that the consignment was still available for delivery by the railways; and I have no doubt whatsoever that the consignment has been lost. The learned Judge was wrong in treating the case to be one of mere non-delivery and in inferring misconduct on the part of the railways. There was no evidence whatsoever to prove misconduct; it was for the respondent to prove it.

The railway administrations had already informed it that the consignment had been lost during political disturbances and the loss having been admitted in the plaint, they were no longer required to lead evidence about how the consignment had been dealt with throughout the journey. The appellant could not be held , responsible for acts of violence done by a mob. It was, therefore, exempt from liability according to the risk note.

8. The learned Judge in the Court below rightly proceeded on the footing that the appellant was entitled to a notice of claim u/s 77 separately from the East Indian Railway; he was right in not saying that preferring a claim to the East Indian Railway amounted to preferring it to the appellant. Though the East Indian Railway and the Oudh Tirhut Railway are since 1/1/43 owned by Government, they are two distinct Railway administrations and giving a notice of a claim to

one will not dispense with giving a notice of it to the other if the other is ultimately found liable to pay compensation.

The phrase "railway administration" is defined in Section 3 (6) of the Railways Act to mean the Manager ,of the railway and to include the Government administering it. Preferring a claim to the Government may satisfy the requirement of Section 77 but not preferring a claim to the Manager of another railway. In the *E. I. Rly. Co. v. Jethmal* ILR 26 Bom 669 (P), a suit" against one railway administration was dismissed because no claim was preferred to it, though a claim was preferred to the other railway sued along with it.

In *Dominion of India v. Firm Museram Kishun Prasad* AIR 1950 Nag 85 (Q), it was stated at page 87 that "each railway administration is to be treated as a separate entity with separate existence and personality". Suhrawardy J. in *Duni Chand Ram Saran Das Chopra Vs. Secy. of State and Others*, , repelled the contention that sending to a railway administration a copy of a notice of claim made to another was equivalent to giving a notice of claim to the former.

9. u/s 77 the appellant was entitled to a notice of the respondent's claim before it could be held liable. Admittedly no notice was given to it. The learned Judge held that the respondent's sending to the appellant the letter dated 14-12-1942, the appellant's reply dated 19-1-1943 and the second letter of the respondent dated 2-3-1943 amounted to the respondent's lodging a claim to the appellant.

Under a certain Act a suit could not be filed against any person for anything done by him under it "until any notice in writing of such intended writ or process shall have been delivered to him..... at least one month before the suing out"". The notice was also required to set forth clearly and explicitly the nature of the intended action and cause thereof. These provisions were considered by the Judicial Committee in *Union Steamship Co. of New-Zealand v. Melbourne Harbour Trust Commissioners*, 1884-9 AC 365 (R).

The plaintiff there had only informed the defendant that a very serious accident had happened and that extensive damage had occur-red and suggested to the defendant to send some of its officers to view the extent of the damage for all of which it would be held responsible. Their Lordships held that it was not a notice of action in compliance with the statute. They observed at page 368 :

"It was clearly not intended to be. It docs not give notice of any intended writ or process whatever : it does not clearly and explicitly set forth the cause or nature of the action..... it appears to want all the necessary characteristics of a notice of action as prescribed by the statute."

Their Lordships subscribed to the view that notices of action are not to be construed with extreme strictness, ""but observed that the principle has no application where "the notice of action is not, in form or substance, a compliance with the Act"

Their Lordships" observations are applicable with full force to the facts of the

case before us; no notice of action, in form or substance, has been served by the respondent upon the appellant. Every correspondence or every letter of inquiry cannot be treated as a notice of claim; it may not be necessary to specify the exact amount claimed but there must be some sort of a claim. An inquiry is not the same thing as a claim and cannot be treated as a substitute for it.

In the letters that the respondent wrote to the appellant it only made certain inquiries. There was no suggestion in them of any intention on the part of the respondent to hold the appellant liable and to make any claim against it for the loss of its goods. The reason why such a long period of six months is allowed for making a claim seems to be that the loss, destruction etc. may not become known to the claimant as soon as it occurs, and he may have to enter into correspondence with the railway about the non-delivery of the consignment.

It is only when he knows of the loss of the consignment on inquiring that he can be required to make a claim; it follows that making a claim is quite distinct from making an inquiry. Under a stipulation in a risk note considered in *St. Louis Iron Mountain and Southern Rly. Co. v. Starbird*, (1917) 243 US 592: 61 Law Ed 917 (S), a claim for damages must be reported by the consignee in writing to the delivering line within a certain time and if such notice is not given the company would not be liable. Dey J. observed at page 925 of the *Lawyers' Edition* :

"It is not difficult for the consignee to comply with a requirement of this kind, and give notice in writing to the agent of the delivering carrier. Such notice puts in permanent form the evidence of an intention to claim damages, and will serve to call the attention of the carrier to the condition of the freight, and enable it to make such investigation as the facts of the case require while there is opportunity so to do."

On page 926 it was pointed out that if the plaintiff had given notice within the stipulated time of his intention to make a claim for damages, although the exact amount of the claim might not have been ascertained, it would have served the purpose because it would have given an opportunity to the carrier to make the examination which it was the principal purpose of the stipulation to afford.

In *Shamsul Huq Vs. Secy. of State*, , the object of Section 77 was said to prevent stale and possibly dishonest claims for loss, when owing to delay it might be impossible to trace the transaction or check the allegations made and when the evidence necessary to rebut a dishonest claim might no longer be available. In *AIR 1948 17 (Nagpur)* , Niyogi J. observed that the section is only intended to give an opportunity to the railway administration to make a satisfactory investigation; this is certainly one of the objects in view but I doubt if it could be said to be the only object in view.

The railway administration should not only be asked to make an investigation but also be cautioned that it might be sued for compensation so that it might know what investigation to make and what evidence to preserve. Merely making an inquiry of a railway administration has not the same effect as of giving it a notice

of claim for compelling it to make a satisfactory investigation.

In Governor-General in Council Vs. Ajithbhai Jayanthilal and Co. and Others, , Basheer Ahmad Sayeed J. agreed with the above statements regarding the object of Section 77 in the cases of Shamsul Huq Vs. Secy. of State, , and held that giving a notice of claim to one railway administration amounts to giving a notice of claim to another with which the former enters into correspondence before the expiry of the prescribed period of six months.

With great respect to the learned Judge I do not see how giving information of loss can be said to be equivalent to making a claim for compensation for the loss. So long as there is no communication of any intention to hold it liable for the loss, it cannot amount to lodging a claim before it. The view taken by Basheer Ahmad Sayeed J. was dissented from by Mack J. in Kishanlal Roopchand and Co. Vs. Indian Dominion and Another, ; he laid down that even now the different railways are different administrations and that a notice of the claim must be given to the particular railway administration sought to be made liable, its acquiring information of the claim made to another railway administration being not enough.

I respectfully agree with the observations of Jenkins C. J. in the case of ILR 26 Bom 669 (P), at p. 686 that it is not enough that the railway administration ultimately found liable for the loss might have become aware that a claim was made by the plaintiff in respect of the lost goods. The learned Chief Justice emphasized the fact that the plaintiff himself did not intend that the claim preferred to one railway administration should either be referred by it to the other railway administration ultimately found liable or be treated as a claim on the other.

In the present case also the respondent did not intend that the claim made by it on the East Indian Railway on 1-10-1942 should be transferred by it to the appellant or be treated as a claim on the appellant. There is no evidence whatsoever that the East Indian Railway made any inquiry of the appellant on receiving the notice of claim dated 1-10-1942; its-saying in its replies that it was making inquiries is no legal evidence of inquiry of the appellant.

The contention that the notice of claim made would probably be forwarded to the proper quarters and that redress would be facilitated was repelled by Lord Campbell in. Garton v. Great Western Rly. Co. (1858) 27 LJ QB 375 (W); his reply was that the experience of Court abundantly proves the necessity of protecting railways from groundless litigation and the Legislature has given the protection in question.

The formality imposed by the Legislature cannot be dispensed with even though in a particular case the Court is convinced that the evil aimed at had no existence; see case of ILR 26 Bom 669 at p. 688 (P). In the case of Duni Chand Ram Saran Das Chopra Vs. Secy. of State and Others, , sending to one railway administration for ,its information a copy of a notice given to another railway

administration was held to be not enough. A claim need not be preferred by the plaintiff himself; it can be preferred on his behalf also.

But again it must be a claim and not merely giving an information of a claim made on another railway administration. No correspondence entered into with the appellant by any other railway administration could be relied upon by the respondent as a claim made on its behalf; neither did the East Indian or the Bengal and Assam Railway Act as its agent nor did it make any claim on the appellant. In *The Salem Dayal Bagh Stores, Ltd. Vs. The Governor-General in Council, South Indian Railway and Others*, the facts were similar to those in the present case and the suit was held to be barred by Section 77.

The plaintiff wrote a letter to the S. I. Railway informing it that the consignment had not reached the destination and asking for an inquiry into the matter, the S. I. Railway entered into correspondence with the G. I. P. Railway on its basis treating it as a claim and yet Happell J. held that the correspondence did not amount to preferring a claim to the G. I. P. Railway.

10. The claim must be made within six months from the date of the delivery of the goods for carriage by railway. This means that in the present case the respondent ought to have made a claim on or by 9-2-1943. Consequently the respondent's letter dated 2-3-1943 to the appellant, even if it were treated as a claim on it, would not have fulfilled the requirement of Section 77.

In *Amarchand Pannalal v. Union of India* AIR 1955 gau 221 (Y), Sarjoo Prasad C. J. was inclined to the view that the period of six months should be counted from the day when the goods were delivered to the consignee or ought to have been delivered to him and not from the date on which the consignor delivered them to the railway in order to be carried. With great respect I think that the words "from the date of the delivery of the animals or goods for carriage by railway" mean from the date of delivery to the railway and not "from the date of the delivery by the railway of the goods." The words "for carriage by railway" govern the word "delivery" and cannot govern the words "animals or goods". "From the date of the delivery" refers to the date of actual delivery, yet there cannot possibly be any delivery if the goods are lost or destroyed.

11. Estoppel was pleaded against the appellant and the learned Judge accepted the plea; his view was that it was estopped from Pleading the want of a claim u/s 77 by its admission that the consignment was lost within, its jurisdiction and repudiating all liability for the loss on the basis of the risk note. I do not understand how the appellant's reply of 19-1-1943 to the respondent's inquiry whether it had handed over the consignment to the East Indian Railway (at Eara Banki) could be said to act as an estoppel against it or a waiver of the requirement of a claim u/s 77.

The reply did not say that the appellant need not prefer any claim. It did not even repudiate any liability for the loss, but on the other hand mentioned that the matter was still under inquiry. There was no other communication from the

appellant to the respondent prior to 10-2-1943. Any communication subsequently could not possibly be treated as a waiver. Waiver was relied upon by Lort-Williams J. in the case of Shamsul Huq Vs. Secy. of State, .

With great respect I am unable to see how the correspondence entered into by the railway administration with the plaintiff could amount to a waiver and estop it from pleading the want of a claim. Moreover the observation of Mr. Justice Lort-Williams was obiter because he did not base his decision on it, he having found that there was no loss which required a claim u/s 77. Finally there can be no estoppel against statute.

12. There remains the question of limitation. The learned Judge has not discussed it at all in his judgment though there was an express issue about it. In the grounds of appeal it has not been pleaded that the respondent's suit was barred by time, but since it is a question of law we have allowed the appellant to raise it orally. Since the consignment has been found to have been lost, the suit ought to have been filed within one year from the date when the loss occurred.

There is no direct evidence of the date when it occurred, but there is hardly any doubt that it occurred somewhere in the neighbourhood of August 12, 1942. It has been found that the consignment was lost in political disturbances of August, 1942. The respondent himself stated in the plaint that had it not been lost it would have been delivered to it within a week; it follows necessarily that the loss occurred within a week from 10-8-1942.

The suit was instituted on 3-1-1944 and was, therefore, clearly barred by time. The respondent calculated the period of limitation from 12-1-1943, on which date the East Indian Railway informed it of the loss during political disturbances and its refusal to entertain the claim, and 20-4-1943 on which date it informed it that it was not possible to say whether any of the stolen bags was in its lost property office.

The period of limitation runs from the actual date of loss and not from the date when it comes to the notice of the plaintiff; the date when he comes to know of the loss is utterly irrelevant, not being an ingredient of the cause of action. It is axiomatic that the date of the happening of an event is different from the date of knowledge of the happening. A consignee may not know of loss of the consignment as soon as it takes place and if the law of limitation contained in Article 30 operates harshly upon the consignee, the remedy is with the Legislature and not in distorting the language used in Article 30.

The respondent might have not known prior to 12-1-1943 that the consignment had been lost but it does not mean that it had not been lost months earlier. The railway administration also might have taken four months to discover the loss, but it does not mean that the loss did not occur in August, 1942. The period of limitation does not at all depend upon the correspondence entered into by a consignor or a consignee with the railway administration concerned. A railway administration can certainly not be placed in a worse position merely on account

of its giving replies to the inquiries made by a consignor or a consignee.

The law would be absurd if the present suit were held to be within time on account of the replies given by the railway administrations but would have been held to be barred by time if they kept quiet and not answered any of its letters. The period of limitation also cannot run from the date on which the railway administration refuses to entertain the claim, because the refusal is no part of the cause of action. The period of limitation runs from, the date of refusal to comply with a demand only when the suit is based on a cause of action which requires a demand and refusal. I find that the suit was barred by time.

13. Article 31, Limitation Act, does not govern the case which is of loss and not of nondelivery or delay in delivery. But even if that article had applied, the suit would have been held to be barred by time. "When the goods ought to be delivered" means the date on which the goods would normally be delivered. The word "ought" suggests compulsion to deliver it at a certain time: this compulsion could arise only out of the contract between the consignor and the carrier. Where no time for delivery of the goods is mentioned in the contract, there is an implied term to deliver them within a reasonable time and what is reasonable time is a question of fact. Cockburn C. J. said in *Hales v. London and North Western Railway Co.* 1863 32 LJ QB 292 : 129 RR 650 (Z) ; "Where no time is mentioned for delivering goods carried, the obligation of the carrier is to deliver them within a reasonable time; and that is a question of fact." Blackburn J. said in the same case that the carrier is bound to carry the goods only according to the route which he holds out to the public and to deliver them in a reasonable time, having regard to that route. Erle C. J. said in *Taylor v. Great Northern Rly. Co.* (1866) 1 CP 385 (Z1), at p. 387 : "When....there is no express contract there is an implied contract to deliver within a reasonable time, and that....a time within which the carrier can deliver, using all reasonable exertions."

In the case of *The Governor-General in Council Vs. Kasiram Marwari*, , Ramaswami J. stated that 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. No date for delivery of the consignment was stipulated in the contract by the respondent; therefore, the period of limitation would run from the date on which the consignment ought to have been delivered to it in the normal course. The respondent itself has stated in the plaint (paragraph 3) that "the goods consigned should have reached the destination within one week; accordingly it should have instituted the suit before the end of August, 1943, even according to Article 31.

But I find that extended meaning has been given to the phrase "ought to have been delivered" in some cases; this seems to me more by way of giving redress to a consignee who has lost his consignment than by judicial interpretation. In the case of *The Governor-General in Council Vs. Kasiram Marwari*, , though the consignment was said to have been lost in political disturbances of August, 1942, the suit instituted in 1947 was held to be within time under Article 31 just

because it was within one year from the date on which the railway administration informed him of the loss of the consignment.

Similarly in *V.S. Gopalaswami Aiyar Vs. Kachi Kalyana Rangappa Kalakka Thola Udayar and Others*, and *The Governor-General in Council Vs. Khadi Mandal*, , the period of limitation was said to run from the date of refusal to deliver the goods by the railway. With great respect to the learned Judges I do not think that the date on which the railway administration informed the plaintiff of the loss was the date on which it ought to have been delivered; if the consignment had been lost in August, 1942, I do not understand how it could be said that it ought to have been delivered on a later date.

Since it was destroyed it could not possibly be delivered; but even otherwise the period of delivery would be the normal period when the consignment would be expected to reach the destination and would certainly not depend upon the time taken by the railway administration in making inquiries and communicating the result thereof to the consignee. If Article 31 is applied even to a case of loss (when really Article 30 should be applied) it would not be open to the plaintiff to calculate the date on which the consignment ought to have been delivered on the footing that the consignment having been lost there could not possibly arise any question of the normal date of its delivery.

He cannot treat a consignment as lost when he sues on a cause of action of non-delivery; in such a case he must sue within one year from the date on which the consignment would have been delivered to him in the normal course. *South India Ry. Co. Vs. S.P.R.S. Narayana Iyer*, , was a case of pure nondelivery; the period of limitation was computed by Banerji J. not from the receipt by the plaintiff of a letter from the railway administration offering to pay compensation but from the date when the consignment ought to have been delivered normally. The consignment was booked on 16-1-1913 and allowing one month, the normal period for transit, the period of limitation was held to start running on or about 15-2-1913.

In *Raigarh Jute Mills Ltd. Vs. Commissioners for the Port of Calcutta*, , Gentle J. calculated the period of limitation from the date on which the plaintiff was informed that the consignment had been lost and not from the date of expected delivery in a normal course. It may be right that if a consignment is loaded in several wagons, they all need not reach the destination on the same day and that the date on which a wagon reaches it in advance cannot be said to be the date when the consignment ought to have been delivered, but it does not follow that the date of the expected delivery is the date on which the consignee is told that no delivery would take place. If the railway administration enters into correspondence with him and tells him that inquiries are being made, it does not mean that the railway administration informs him necessarily that delivery would be made at a later date.

The correspondence involves no promise on behalf of the railway administration

to deliver the consignment at all events. Even if the correspondence creates expectation in the plaintiff's mind that the consignment would be delivered, it does not advance the date when the consignment ought to have been delivered; if delivery takes place later, it would be a case of delay in delivery and not a case of delivery on a date when it ought to have been done. There is such a thing as delay in the delivery of a consignment; Article 31 itself contemplates delay in delivery as a cause of action in a suit.

If the date on which the goods are delivered at the end of inquiries by the railway administration were supposed to be the date on which they ought to have been delivered, there would be no cause of action at all. The words "when the goods ought to be delivered" apply not only in a case of non-delivery but also in a case of delayed delivery and must have the same meaning in either case. If in the case of delayed delivery they mean the normal date of delivery, they must mean the same even in a case of non-delivery.

If the actual date of delivery in a case of delayed delivery is not the date when the goods ought to have been delivered, it is not such a date in a case of non-delivery. As I said earlier in a case of non-delivery, the reason for the non-delivery, such as the loss or destruction, should be completely ignored, if the suit is said to be within limitation under Article 31. In *Malladi Seetharama Sastri Vs. The Hyderabad State*, the suit instituted on 31-10-1945 for non-delivery of a consignment booked on 21-8-1944 was held to be within time, but that was in view of the fact that in 1944 the railways were afflicted by war conditions and congestion in traffic and the period of two months and sixteen days could not have in any event been considered to be an unreasonable period within which the consignment ought to have been delivered.

The date on which the consignment ought to be delivered depends upon the express or implied terms of the contract between the consignor and the railway, if a date is specified for delivery, that is the date, otherwise the date on which the goods would normally reach the destination. What is to be noted is that the date, depending upon the contract, depends upon the circumstances existing on the date of the contract, that is the date on which the consignment is delivered to the railway for carriage, and not on anything that happens subsequently.

If the consignment is delayed or lost on account of something happening subsequently and not within the contemplation of the parties, the expected date of delivery remains what it would have been if nothing out of the normal had happened. Therefore, the correspondence between the consignee and the railway or the refusal of the railway to deliver the consignment does not affect the expected date of delivery. If the law that requires a plaintiff, who does not know what has happened to the consignment and naturally spends time in corresponding with the railway concerned, to institute a suit within a year or so of the date of consignment is harsh, the remedy lies with the Legislature and not in straining the clear language of Article 31.

14. The suit ought to have been dismissed on account of its being barred by time there being no proof of misconduct for the loss and the plaintiff's not having preferred a claim within six months to the Oudh and Tirhut Railway, which was responsible for the loss of the consignment.

15. I would, therefore, allow the appeal with costs and dismiss the suit with costs on parties.

Beg, J.

16. This is a defendant's first appeal arising out of a suit for recovery of Rs. 5,135/11/-. The suit out of which this appeal arises was filed by the plaintiff Messrs. Karam Chand Paras Ram, a firm, against the two defendants, namely, the Governor-General in Council representing the East Indian Company Railway and the Oudh and Tirhut Railway.

The plaintiff claimed to be the assignee of a Railway Receipt relating to a consignment of 37 bales of new gunny bags sent by the consignor, the Biratnagar Jute Mills Limited. This consignment was booked at Jogbani Railway station on the Bengal and Assam Railway for Ghaziabad, a station on the East Indian Railway, under R/R No. 565484, Invoice No. 13. In the course of transit, the consignment was to be taken by the Bengal and Assam Railway from Jogbani upto Katihar Junction, by Oudh and Tirhut Railway from Katihar Junction upto Bara Banki and by East Indian Railway from Bara Banki to Ghaziabad.

17. The plaintiffs case was that the consignment was delivered at Jogbani Station for transit, but it was not delivered to him at Ghaziabad. He was informed that it was lost, and, as a result, he sued the defendant for non-delivery of the same which, according to him, was due to misconduct on the part of the Railway Administration.

18. The East Indian Railway had finally refused to entertain his claim by their letter dated 12th January, 1943 and the Oudh and Tirhut Railway had also finally refused to deliver the goods by their letter of 20th April, 1943; hence the present suit was filed by the plaintiff on 1st January, 1944.

19. It was admitted on behalf of the defendant that the consignment in question was delivered for carriage to the Bengal and Assam Railway at their Jogbani railway station as alleged by the plaintiff. The suit was, however, resisted by the defendant on three grounds. The main plea of the defendants was that the consignment in question was looted by a riotous mob at the Barauni railway station during August 1942 disturbances. The second plea was that no notice was given by the plaintiff u/s 77 of the Railways Act, and the third plea was that the suit was barred by limitation.

20. It may be noted that both the railways were under the Central Government on the relevant dates.

21. The trial Court found against the defendant on all the three points and

passed a decree against the Oudh and Tirhut Railway for an amount of Rs. 5,135/11/- with pendente lite and future interest at 3 per cent, per annum and costs.

22. Dissatisfied with the said judgment this First Appeal has been filed on behalf of the Oudh and Tirhut Railway.

23. The first plea of the defendant-appellant, namely, that the train carrying the consignment in question was subjected to mob violence at Barauni station of the Oudh and Tirhut Railway cannot be substantiated by the defendant. On behalf of the defendant four witnesses were produced to substantiate this part of the defendant's case. Their names are : (1) Bhibhuti Bhushan Chatterji, (2) Jai Narain Das, (3) Mohammad Rabbani and (4) Ram Raksha Prasad. According to the evidence of Bhibhuti Bhushan Chatterji, the consignment was despatched from Jogbani Railway Station on 10-8-1942, and it reached Katihar Railway Station on 11-8-1942 at 0/21 hours by 754 down. According to the statement of Jai Narain Das, Head Transhipment Clerk at Katihar Junction, the wagon carrying the consignment was handed over to B. & N. W. Railway on 11-8-1942 at 9 hours and the said wagon was despatched from Katihar on 11-8-1942 by 163-Up via Bara Banki. According to the statement of Mohamrnad Rabbani, Trains Clerk at Katihar, the said wagor left Katihar for Barauni on 11-8-1942 by 163-Up at about 15 hours. The evidence of the above three witnesses is the entire evidence relating to carriage of the said consignment. All that it indicates is that the consignment in question reached Katihar and that the said wagon left Katihar on 11-8-1942 by 163-Up.

There is no evidence to indicate as to how far the said wagon went. There is no evidence to indicate that the wagon carrying the said consignment was looted at Barauni. There is further no evidence to indicate how far and where the said consignment was carried after it had reached Katihar. The statement of Ram Raksha Prasad shows that there was looting at Barauni Junction from 14th to 16th August, 1942, and a list of looted wagons was prepared. This list has not been filed. The withholding of the said list raises a presumption against the Railway Company.

Under the above circumstances, it must be held that the defendant-appellant hopelessly failed to substantiate its case that the wagon was lost in the course of looting as alleged on its behalf. In this state of evidence it is not possible to state as to what happened to the wagon which was carrying the consignment in question after it had reached Katihar Station. Under Risk Note H it was clearly the duty of the Oudh and Tirhut Railway to disclose to the consignor how the consignment was dealt with throughout the period it was within its possession and control. Even the Guard of the train which is alleged to have left Katihar with the said wagon has not been produced to throw light on this matter.

Under the above circumstances, it must be held that the consignment was not delivered by the Railway Company owing to the misconduct on the part of the

Oudh and Tirhut Railway Administration.

24. The second plea was that no notice was given u/s 77 of the Railways Act. It has been argued on behalf of the respondent that there has been substantial compliance with Section 77 of the Railways Act, and, in any case there was no necessity of notice in view of the Full Bench decision reported in Governor General in Council and Others Vs. Mahabir Ram and Another, .

25. The facts in the present case are that formal notice was given by the plaintiff on 1st October, 1942 to the East Indian Railway: vide Ext. 23 at page 42. As a result of it a number of letters and telegrams were exchanged between the plaintiff and the East Indian Railway which indicate that the matter received the attention of the East Indian Railway. On 9th December, 1942 the East Indian Railway wrote to the plaintiff that the matter had been referred to the foreign railways, that urgent references to the railways concerned in the matter had also been made and a reply would be sent to him later on.

On 23-12-1942 again the East Indian Railway wrote to the plaintiff that they were in communication with the foreign railways with regard to this matter. It is, therefore, evident that the contents of the plaintiff's notice were communicated by the East Indian Railway to the Oudh and Tirhut Railway which was one of the Railway Companies concerned in the matter and after communicating and contacting the railways concerned, the East Indian Railway gave a definite reply on 12th January, 1943 to the effect that the consignment was looted by mob violence during the political disturbances of August, 1942 and that therefore they had rejected his claim.

There is also evidence on record to indicate that the plaintiff was simultaneously communicating with the Bengal and Assam Railway as well as the Oudh and Tirhut Railway about the matter. It is not necessary to refer to the correspondence between the plaintiff and the Bengal and Assam Railway. So far as Oudh and Tirhut Railway is concerned it would appear that the plaintiff had sent a letter to them on 4th December, 1942, stating that in their letter the East Indian Railway had mentioned that they were in communication with the railways concerned, and he was therefore writing to them for enquiry.

The plaintiff had also given the date and reference of the letter of the East Indian Railway sent to him. The letter of the Oudh and Tirhut Railway dated 19-1-1943, shows that the Oudh and Tirhut Railway took exactly the same position in the matter as the East Indian Railway and stated that "the above consignment while in transit over this railway is reported to have been looted by the mob at Barauni Junction during the last disturbances of August 1942." This shows that the matter was investigated by the Oudh and Tirhut Railway.

In this letter it was further stated by the Oudh and Tirhut Railway that they were making further enquiry into the matter and would communicate the result of their investigation later on to the plaintiff. On 2nd March, 1943 the plaintiff wrote to the Oudh and Tirhut Railway that ho had heard that some of his goods were in

the Lost Property Office of the Oudh and Tirhut Railway Gorakhpur and his representative might be permitted to see them. This request was refused by their letter of 6th March, 1943 on the ground that there was nothing to connect the said goods with the consignment claimed by the plaintiff.

On 20-4-1943 the Oudh and Tirhut Railway finally wrote to the plaintiff a letter which showed their inability to trace out the plaintiff's goods. The evidence relating to the matter therefore establishes the following facts:

1. That the plaintiff had laid a formal claim before the East Indian Railway;
2. That the East Indian Railway had communicated the said claim to the Oudh and Tirhut Railway;
3. That the Oudh and Tirhut Railway, had, as a result of the said communication by the East Indian Railway, started enquiry in the matter;
4. That the plaintiff also wrote to the Oudh and Tirhut Railway giving reference of his correspondence with the East Indian Railway and the reply by the East Indian Railway to his letter and making further enquiries from the Oudh and Tirhut Railway; and,
5. That the Oudh and Tirhut Railway, as a result of the communication directly made to them by the plaintiff and also as a result of the communication made to them by the East Indian Railway, entered upon an investigation of the matter and took up the same position as the East Indian Railway, namely, that the consignment was looted by the mob, and expressed their inability to deliver the goods demanded by the plaintiff.

26. Thus there can be no manner of doubt that even though the formal claim was not made direct to the Oudh and Tirhut Railway, it was communicated to them through the East Indian Railway, that the claim of the plaintiff was brought to the knowledge of the Oudh and Tirhut Railway through the East Indian Railway, that the plaintiff had also directed a communication to the Oudh and Tirhut Railway about the matter, that the Oudh and Tirhut Railway had made thorough investigation into the matter and had given their reply to the effect that the consignment in question was looted by the mob and that they had finally expressed their inability to deliver the goods to the plaintiff. Under the above circumstances, I am of opinion that Section 77 of the Railways Act has been substantially complied with.

27. In this connection reference might be made to Section 77 of the Railway Act which runs as follows :

"A person shall not be entitled to a refund of an overcharge in respect of animals or goods carried by railway or to compensation for the loss, destruction or deterioration of animals or goods delivered to be so carried, unless his claim to the refund or compensation has been preferred in writing by him or on his behalf to the railway administration within six months from the date of the delivery of

the animals or goods for carriage by railway."

28. A perusal of the above section shows that the notice is not a condition precedent to the filing of a suit. In fact the word "notice" is not used at all in the section. The use of the word "notice" imports a certain amount of formality. Further the notice, if any, to be given is not a notice of the suit but merely a notice of the claim. It is not a condition of the maintainability of the suit. The railway administration, can therefore waive it. Its only purpose appears to be to enable the Railway Company to enter upon investigation before the records in their office are destroyed or weeded out.

The purpose of the notice is to enable the railway to have an opportunity of settling the claim by making an enquiry into the matter in time with a view to prevent dishonest claims being put up all of a sudden by unscrupulous persons after a long time taking advantage of the fact that the railway records have been weeded out. Further, it is important to note that the notice can be preferred in writing by the claimant himself or it can be given by anyone "on his behalf" to the railway administration concerned. The notice can therefore be given on behalf of the claimant by any person.

It is not necessary that this person should be the duly authorised agent of the plaintiff for the purpose. The whole purpose of Section 77 therefore seems to be that knowledge of the claim is brought home to the Company within a period of six months by the plaintiff or some one else on his behalf. In the present case the knowledge of the claim was no doubt brought home to the Oudh and Tirhut Railway indirectly through the East Indian Railway, and the knowledge of non-delivery and loss was brought home to the Oudh and Tirhut Railway directly by the plaintiff himself. The Oudh and Tirhut Railway were informed of it within time.

They had made thorough investigation and enquiry into the matter, and they had finally taken up the same position, as the East Indian Railway. Under the above circumstances, I am of opinion that there has been substantial compliance with the requirement of law. The above view is supported by a number of cases to which reference might be made.

29. In *Shamsul Huq Vs. Secy. of State*, , it was held that :

"The object of Section 77 is to prevent stale and possibly dishonest claims for loss, when owing to delay it might be impossible to trace the transaction or check the allegations made, and when the evidence necessary to rebut a dishonest claim might no longer be available. It is intended as a weapon of defence against fraud not as a means to enable the railway authorities to deprive their customers of their just dues." (p. 333).

30. In *Governor-General in Council Vs. Ajithbhai Jayanthilal and Co. and Others*, , a similar view was taken, and it was held that

"the object of the section was not to deprive customers of their legitimate right, but only to enable the railway administration to have sufficient time to

investigate the claim set up without allowing the parties to resort to litigation." (head-note).

31. In AIR 1948 17 (Nagpur) , relying on Shamsul Huq Vs. Secy. of State, , it was held that :

"Section 77 is only intended to give an opportunity to the Railway Company to make satisfactory investigation. Where, therefore, the Railway Company has admitted that loss of goods belonging to the plaintiff has occurred in transit, that admission itself, dispenses with the enquiry into the validity or invalidity of the notice of the claim made by the plaintiff." (head-note).

32. In (S) AIR 1955 gau 221 (Y), it was held that :

"Where in a case the railway authorities take notice of a complaint and send an officer to investigate the claim and assess the damages and that officer after investigation and assessment fixes the amount of damages it would be futile for the consignee to send any further notice of the claim to the railway authorities. In the circumstances there is no further requirement of any notice u/s 77 of the Act and there is an estoppel against the railway from pleading the absence of such a notice in bar of the suit." (head-note).

33. In all the above cases a liberal view of Section 77 was taken, and in view of the contents of Section 77 and phraseology used therein, I am inclined to agree with the said view.

34. On behalf of the appellant, however, reliance was placed on a number of cases in which a more strict view of Section 77 is taken, and it is laid down that a formal notice direct to the Railway Company concerned should be given. The cases reported in AIR 1947 Mad 362 (X) Kishanlal Roopchand and Co. Vs. Indian Dominion and Another, and Duni Chand Ram Saran Das Chopra Vs. Secy. of State and Others, , were referred to in this connection. A perusal of these cases shows that the facts in those cases were not altogether similar to the facts of the present case.

In the present case it may be noticed that the plaintiff's claim was not only communicated to the Railway Company concerned indirectly, but that the plaintiff had also entered into direct communication with the said Railway Company and that the said Railway Company had entered upon a thorough enquiry and investigation and as a result of it had given a finding to the effect that the consignment in question was looted. This finding itself is the very finding which is the basis of the defence of the O. & T. Railway in the present case.

The cases referred to are different on facts. In so far, however, as they take a strict view of Section 77, I am not inclined to agree with them and would favour the liberal interpretation of the matter taken in the cases cited on behalf of the plaintiff-respondent. Such a liberal interpretation alone will be conducive to the interest of justice and equity. As observed by their Lordships of the Supreme Court in The Bengal Immunity Company Limited Vs. The State of Bihar and

Others, , the construction placed on the statute by a Court should be such as to suppress the mischief and advance the remedy, The view preferred by me is in accordance with the above rule of construction laid down by the Supreme Court.

35. In any case, I am also of opinion that there is substance in the contention of the learned counsel for the respondent that no notice in the present case was necessary in view of the Full Bench decision of this Court reported in 1952 All LJ 443 : AIR 1952 All 89 (D). In this case it was held that:

"Where there is destruction or deterioration of goods, it is not "loss" within the meaning of the word occurring in Section 77. The word "loss" as used in this section means not loss to the owner but loss by the railway administration : "The word "non-delivery" is a genus. Non-delivery of goods may be due to a variety of causes. 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 of the Indian Railways Act is necessary but where non-delivery of goods is due to any other reason then no such notice is required." (head-note).

36. In the present case the Railway Company has failed to prove that the non-delivery is due to the loss of goods by the railway administration, as they have failed to prove their case that the goods were looted. The finding in the present case is that the cause of non-delivery was the misconduct of the Railway Company. In the above Full Bench decision it was further held that :

"When the consignments were not delivered to the plaintiffs and no good reason for non-delivery is shown the inference is irresistible that the non-delivery was due to the misconduct and negligence of the employees of the defendant-Railway Administration." (head-note) ,

In such a case a notice u/s 77 of the Railways Act was not held to be necessary. I, therefore find myself unable to uphold the plea of the appellant based on Section 77 of the Railways Act.

37. In another Full Bench case of this Court reported in Mutsaddi Lal Vs. Government-General in Council, , the same principle was laid down. Reference in this connection might also be made to The Governor-General of India in Council Vs. G. Krishna Shenoy, .

38. The third plea raised on behalf of the defendant-appellant relates to the question of limitation. The two articles of the Limitation Act on which reliance can be placed are Articles 30 and 31. Whichever article is applied, I am of the opinion that the suit of the plaintiff is not barred. If Article 30 is applied, then the burden of proving that the actual loss or in-jury to the goods had occurred more than one year prior to the date of the suit lay on the Railway Company as the matter was within their special knowledge. In the present case they have failed to substantiate their case that the loss or injury had occurred in August 1942. Having failed to discharge this burden and having failed to prove the date of the loss or injury or even the factum of loss or injury as alleged by them, the

plaintiff's claim cannot be said to be barred by limitation. The entire case-law on this point is in favour of the respondent.

39. To cite an Allahabad case, reference might be made to Jugal Kishore Vs. Great Indian Peninsula Railway and Another, . In this case it was held that Article 30 refers to losing or injuring goods by the carrier and not by the plaintiff, that is to say, time begins to run from the time when the carrier lost or injured the goods and not from the time when the consignee may be said to have suffered loss. The following observations in the said case are relevant :

"The burden of proving when the goods were lost was decidedly on the Companies, and it not being proved that the goods were lost by them more than one year before the institution of the suit the claim is not barred by Article 30." (p. 23).

To the same effect are the cases reported in The Governor-General in Council Vs. Khadi Mandali, and Malladi Seetharama Sastri Vs. The Hyderabad State, . See also Chitaley's Limitation Act, Article 30, N. 7, Pt. 2 and Rustomji's Limitation Act (1915 Edn.) p. 650.

40. The more appropriate article, however, to apply in the present case, is, in my opinion, not Article 30, but Article 31 of the Limitation Act. It was held in Governor-General in Council v. Brindaban 54 Cal WN 2 35 that

"Article 30 of the Limitation Act relates to a suit brought by a consignor for loss in circumstances pleaded of some specific loss having occurred on some specific date in some specific manner which is made the basis of claim..... It cannot apply to a case where the plaintiff does not know whether his goods were lost or destroyed." (P. 36).

In the present case the plaintiff did not know what specific loss was caused to the goods nor was he aware of the specific date or the specific manner of loss. He merely made a general allegation of loss, i.e., a loss which is always the result of non-delivery of goods. In this view of the matter I am of opinion that the proper Article applicable to the present case would be Article 31.

41. If Article 31 is applied, then also the present case, in my opinion, is not barred by limitation, for the date when the limitation begins to run is the date "when the goods ought to be delivered". On behalf of the respondent it is argued that the words "ought to be delivered" should be interpreted in a fixed and static sense meaning thereby the date on which the goods should be delivered in the ordinary and normal course.

42. Reliance in this connection is placed on paragraph 3 of the plaint which states that the goods in the ordinary course should have reached the place of destination at Ghaziabad in about a week. I, however, find myself unable to agree with the above interpretation of column 3 of Article 31 suggested on behalf of the appellant. In my opinion the words "when the goods ought to be delivered" in this column do not mean the date on which the goods should have

reached the destination in the normal course, but they mean the date on which the goods in the particular circumstances of that case would have been delivered to the plaintiff. Such a date would vary with the particular circumstances of each case. Thus where the railway administration holds out a hope of the delivery of goods, the date on which the goods "ought to be delivered" as contemplated in column 3 would be the date when the Railway Company finally refused to deliver the goods, and made it known beyond doubt to the plaintiff that the goods cannot be delivered to him. This view is borne out by the Full Bench decision of this Court reported in *Mutsaddi Lal Vs. Government-General in Council*, , referred to above. The relevant head-note of this case reads as follows :

"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 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 or a reasonable date that may be fixed on a consideration of events subsequent to the handing over of the consignment to the carrier for carriage.

Events which affect the means of transport or the way in which the consignment itself has been dealt with after its being handed over to the carrier for transit have an important bearing on the construction of the phrase "when the goods ought to be delivered". Such events may extend the date contemplated by this phrase.

Where no time was fixed for the delivery of the consignment and the correspondence between the railway administration and the consignee showed that the matter was being enquired into and there was no definite refusal by the railway administration to deliver the same and the suit for compensation for nondelivery of the consignment was brought within one year from the last letter from the railway administration informing that the matter was receiving attention : Held, that the suit was within time."

Any other interpretation of this article would result in disastrous consequences. It would enable the Railway Company to go on promising the delivery of goods to the plaintiff for over a year, and then turn round and take up the plea that the plaintiff's suit was barred by limitation.

Such a position is neither reasonable nor honest. An interpretation that leads to such unjust and inequitable consequences could not be the meaning intended by the legislature. Until the plaintiff definitely knows that the goods will not be delivered to him, it is futile for him to file a claim. When the Railway Company

itself is holding out hopes of delivery, a suit by the plaintiff might become infructuous. The plaintiff to whom hopes of delivery are held out can justly say that he is not entitled to presume that the goods would not be delivered to him and ought, therefore, to have been delivered to him. Therefore, the plaintiff's statement in para 3 of the plaint relating to the date on which the goods should have reached in the ordinary course does not affect his claim.

The cause of action in para 8 of the plaint is definitely alleged by the plaintiff to have been borne on 12th January, 1943 and 20th April, 1943, when both the Railway Companies finally refused to deliver the goods. This is the case of the plaintiff and it is supported also by evidence and circumstances of the case. The loss referred to in paras 4 and 5 of the plaint is the loss resulting from non-delivery on account of the misconduct of the defendant. Both the dates alleged by the plaintiff to be the dates for the cause of action are borne out from the letters of the defendant Companies themselves. The view above taken is supported by the decision of the Allahabad High Court reported in Jugal Kishore Vs. Great Indian Peninsula Railway and Another, , refer-red to above.

The same view has been taken in a large number of cases by other High Courts of India. Reference in this connection might be made to Raigarh Jute Mills Ltd. Vs. Commissioners for the Port of Calcutta, ; AIR 1948 Sind 26 (L); AIR 1949 Pat 268 (J); Dominion of India v. Khurana Bros. AIR 1951 Simla 254 (Z9); AIR 1924 Mad 567 (Z2) : AIR1950Mad438 ; Malladi Seetharama Sastri Vs. The Hyderabad State, .

43. The learned counsel for the appellant could not cite a single authority in support of his contention that the words "when the goods ought to be delivered" mean the dates when the goods should have reached in the normal course. In any case, the contention advanced by him being contrary to the view laid down in the Full Bench decision of the Allahabad High Court, cannot be upheld. I would, therefore, overrule it. Thus none of the contentions advanced by the learned counsel for the appellant have any force.

44. So far as the question whether the defendant is exempt from the liability under the Risk Note H executed by the plaintiff is concerned, I am of opinion that this point was not raised on behalf of the defendant in the trial Court. No issue was framed upon it by the trial Court. This point was not even taken in the grounds of appeal. Under the circumstances, I do not see how it is open to the defendant appellant to raise this point at this stage and to claim it as a matter of right. Even on merits I am of opinion that there is not much force in it.

45. For the above reasons, I am of opinion that there is no substance in this appeal, I would, therefore, dismiss it with costs.

(As there was a difference of opinion between the two Hon''ble Judges) the following questions were laid before the Hon''ble the Chief Justice for obtaining a third Judge's opinion on them.

1. Is the plaintiff's suit liable to be dismissed on the ground that he has failed to comply with the provisions of Section 77 of the Railways Act?
2. Is the plaintiffs' suit barred by limitation?
3. Was the defendant exempt from liability with the risk note H executed by the plaintiff?

(Accordingly the appeal came before the Hon'ble Justice Shri B. Mukerji who delivered the following judgment:)

Mukerji, J.

46. This appeal has been laid before me on a difference of opinion between Mr. Justice Desai and Mr. Justice Beg. Three questions were formulated by the Bench for my opinion.

47. The questions were these : (1) Is the plaintiffs' suit liable to be dismissed on the ground that he has failed to comply with the provisions of Section 77 of the Railways Act? (2) Is the plaintiff's suit barred by limitation? (3) Was the defendant exempt from liability under the risk note H executed by the plaintiff?

48. In order to be able to answer the questions it is necessary to notice a few relevant facts.

49. A suit was filed by Messrs. Karam Chand Paras Ram a firm of merchants against two defendants (1) The Governor General in Council representing the East Indian Railway Company and the Oudh and Tirhut Railway through the Secretary Railway Department Central Government New Delhi and (2) The Oudh and Tirhut Railway through the Chief Commercial Manager Gorakhpur. The suit was for the recovery of Rs. 5135/11/- for damages, for the plaintiff's not having received a certain consignment of 37 bales containing new gunny. bags which had been consigned to them by the Biratnagar Jute Mills Limited.

The consignment was booked at Jogbani Railway Station on the Bengal and Assam Railway for Ghaziabad, which was a station on the then East Indian Railway. The consignment was booked under Railway Receipt No. 565484 -- Invoice No. 13. The consignment was booked on 10th of August 1942. The plaintiff acquired proprietary right in the goods consigned by virtue of the assignment or endorsement of the railway receipt for the consignment in his favour.

50. The case of the plaintiff in brief was that in the ordinary course the consignment should have arrived at Ghaziabad in about a week's time but they never arrived there and the plaintiff was, therefore, not given delivery, as he could not be. Under the circumstances, the plaintiff suffered loss.

51. Some amount of correspondence followed between the plaintiff and the railway authorities concerned in regard to this transaction. According to the allegations of the plaintiff, the East Indian Railway by their letter of 12th of January

1943 finally refused either to deliver the goods or to entertain the plaintiff's claim for damages. The Oudh and Tirhut Railway by their letter of 20th of April 1943 finally refused to settle the plaintiff's claim. The plaintiff further alleged that since the Railway failed to make delivery of the goods the plaintiff gave necessary notice of his claim to the Railway Administration and also to Governor General in Council.

52. Two separate written statements were filed in the suit, one on behalf of the East Indian Railway and the other on behalf of the Oudh and Tirhut Railway, although in both the written statements the Governor General in Council figured as a party.

53. On behalf of the East Indian Railway the facts contained in paragraph 1 of the plaint were substantially admitted. Further, the allegations contained in paragraph 3 of the plaint were also admitted. This defendant stated in paragraph 8 of his written statement that the consignment had never been delivered to the East Indian Railway for further carriage to destination and had, therefore, never been carried by the East Indian Railway for any distance. On this allegation of fact it was pleaded that the East Indian Railway was, not in any way responsible for the non-delivery of the consignment. It is significant to note that in paragraph 8 of the written statement wherein this plea was set out the defendant stated in regard to "non-delivery" and not in regard to any loss.

54. This defendant raised certain legal pleas and these were (a) that the suit was not maintainable because the requisite notice u/s 77 of the Indian Railways Act had not been given to the General Manager of the East Indian Railway within six months from the date of the booking of the consignment; (b) that the suit should be dismissed because the requisite notice u/s 80 of the CPC had not been given; and (c) that the suit was barred by limitation,

55. On behalf of the Oudh and Tirhut Railway except paragraph 1 of the plaint no other paragraph appears to have been admitted. This defendant also raised the following legal pleas. First, that the suit was not maintainable as no claim as required by Section 77 of the Indian Railways Act had been preferred by the plaintiff within six months from the date of the delivery of goods for carriage to the Railway Station. Secondly, that the suit was barred by limitation and u/s 80 of the Code of Civil Procedure. Thirdly, that the Railway Administration was not responsible for the loss of the goods because of the provisions contained in Section 72 of the Indian Railways Act.

In paragraph 6 of the written statement this defendant pleaded that the consignment in question had been delivered for carriage to the Bengal and Assam Railway Authorities at Jogbani Railway Station and in due course it was made over to the B. & N. W. Railway for further carriage to destination and that thereafter the consignment was looted at Barauni Railway Station by a riotous mob during the political disturbances which took place in August 1942 and thus it was pleaded by this defendant that he was not responsible for the consignment

which had been lost under the circumstances absolutely beyond the control of the railway company.

It was further pleaded that there was no privity of contract between the plaintiff and the Oudh and Tirhut Railway and as such the latter was not legally or "equitably responsible" for any loss. It was pleaded in para graph 8 of the written statement that the loss of the consignment was not due to any misconduct or negligence or default on the part of the railway administration and its servants and, therefore, the suit was liable to be dismissed.

56. On the pleadings of the parties the following issues were framed by the Court below:

"1. Is the suit not maintainable as no claim u/s 77 of the Indian Railways Act (No. IX of 1890) was preferred by the plaintiffs within six months of the date of delivery of the goods for carriage by the railway?

2. Is the suit barred for want of notice u/s 80, C. P. C.?

3. Is the suit barred by limitation?

4. Whether the goods consigned were looted by a riotous mob in August 1942 at Barauni Junction Railway Station of B. & N. W. Railway Company, or they were lost on account of the misconduct on the part of the railway administration and its servants; and can any liability for the loss of those goods be fastened on any of the defendants? If so, to what extent?

5. To what, relief are the plaintiffs entitled, and against which defendant?"

57. The trial Court went on to decide issues 1, 3 and 4 together and it arrived at the following conclusions. On the question of fact, namely, whether the consignment had been lost, because there was looting by a riotous mob at Barauni Railway Station, the Court below came to the conclusion that there was no evidence on the record to show that the consignment ever reached Barauni at the time when the station was looted and, therefore, it could not be held that the wagon in which the consignment was put was ever looted.

The trial Judge also found that under risk note H, under which protection was sought by the Railway Administration, it was the duty of the Oudh and Tirhut Railway to disclose to the consignor how the consignment had been dealt with throughout the time when it was in their possession and under their control. No such evidence was given on behalf of the Railway Administration. Therefore, the Court below thought that it was reasonable to infer from what evidence there was on the record that the non-delivery was due to the misconduct of the servants of the Railway Administration of Oudh and Tirhut Railway.

The Court below relieved the East Indian Railway Administration from the responsibility in the matter. On the two legal questions covered by issues 1 and 3 the Court below found that under the circumstances of the case notice u/s 77 of the Indian Railways Act was necessary and that such notice had been given by

the plaintiff. The trial Court held that the plaintiff on 1st October 1942, within two months of the despatch of the consignment, served the East Indian Railway with notice (Ex. 23). That Court further held that certain letters of the plaintiff could be construed as notice u/s 77 of the Railways Act to the Oudh and Tirhut Railway as well, so that, according to the Trial Judge the plaintiff had complied with the provisions of Section 77.

58. On the question of limitation the Court below found in favour of the plaintiff. It may, however, be stated that the Court below did not give any reasons for its finding that the suit was not barred by limitation. In the result the suit was decreed for a sum of Rs. 5135/11/- with interest pendente lite and future at 3 per cent, per annum and with costs as against the Oudh and Tirhut Railway. But the suit was dismissed as against the Governor-General in Council, representing the East Indian Railway who were awarded their costs from the plaintiff.

59. An appeal was preferred against the afore-mentioned decision of the learned Civil Judge of Meerut by the Oudh and Tirhut Railway against whom the decree had been made by the lower Court.

60. On appeal the questions that were canvassed before the Bench before whom the appeal came up for hearing were precisely the questions in regard to which there has been a difference of opinion between the two learned Judges who formed the Bench, namely, Mr. Justice Desai and Mr. Justice Beg.

61. Mr. Justice Desai was of the view that notice u/s 77 was necessary and that no such notice had been given by the plaintiff to the Oudh and Tirhut Railway. He did not agree with the view of the trial Court on this question. He further, was of the opinion that the suit was barred by limitation under Article 30 of Schedule I of the Indian Limitation Act.

On the question, namely, whether the defendant was exempt from liability under risk note H. Mr. Justice Desai has not, as I see it, come to any definite finding. Mr. Justice Beg on the other hand held that under the circumstances of the present case no notice u/s 77 of the Indian Railways Act was necessary; that the suit was not barred by limitation because according to the view of Mr. Justice Beg the appropriate article that applied was Article 31 & not Article 30 and that time began to run from the date when the Railway Administration in this case informed the plaintiff of the fact that they were not going to meet the plaintiff's claim.

62. I shall now take up the first question formulated for my opinion.

63. Section 77 of the Indian Railways Act is in these words :

"A person shall not be entitled to a refund of an overcharge in respect of animals or goods carried by railway or to compensation for the loss, destruction or deterioration of animals or goods delivered to be so carried unless his claim to the refund or compensation has been preferred in writing by him or on his behalf to the railway administration within six months from the date of the delivery of

the animals or goods for carriage, by railway."

64. From the words of the section it would be clear that the section applies to a case where a person claims "refund" or "overcharge" or ""compensation" on account of "loss ", "destruction", or "deterioration of animals or goods". The section does not apply to a case where a person seeks compensation for "non-delivery" or late delivery. A plaintiff suffers loss either when the goods are lost to the carrier because of their being stolen or having been destroyed while the goods are in the hands of the carrier or because of the deterioration of the goods in the hands of the carrier.

A plaintiff also suffers loss when the carrier fails to deliver the goods to him or delivers them very late. The Legislature apparently has treated the two types of losses on different footings. The Legislature has placed a sort of a procedural obstacle in the way of the plaintiff from recovering his losses from the carrier where the goods are lost to the carrier while in the other case, namely, when the goods are lost to the plaintiff because of some other reasons, no procedural obstacle of notice etc. has been placed in the way of the plaintiff. In the case of non-delivery also the goods are lost to the plaintiff.

Under what circumstances a notice as contemplated by Section 77 of the Indian Railways Act is required is now beyond controversy before, either a Bench of two Judges or a single Judge in view of two Full Bench decisions of this Court. The cases are Governor General in Council and Others Vs. Mahabir Ram and Another, and Mutsaddi Lal Vs. Government-General in Council, . In the first case, namely, in the case of Governor General in Council and Others Vs. Mahabir Ram and Another, , the Pull Bench considered the scope of the word "loss" as used in Section 77 of the Indian Railways Act and they also considered the import of the words "non-delivery". The Full Bench pointed out at p. 450 col. 2 (of All LJ): (at p. 896 of AIR Col. 1), as follows :

"The word "loss" as occurring in the section has not the same meaning as in ordinary parlance, for if it were so there was no need of putting the words "destruction and deterioration" in juxtaposition with it. Even in destruction and deterioration there is loss to the owner of the goods. Nevertheless, those two words occur side by side with the word "loss" and when they so occur, meaning must be assigned to them and it must be held that where there is destruction or deterioration of goods, it is not "loss" within the meaning of the word occurring in Section 77.

The word "loss" as used in this section means not loss to the owner but loss by the railway administration for if it meant loss to the owner then there was no need for the words "destruction or deterioration". There is loss to the owner even when there is "destruction or deterioration". The word "non-delivery" is a genus. Non-delivery of goods may be due to a variety of causes....."

The Full Bench also noticed the causes which may lead to non-delivery. The Full Bench further held 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 of the Indian Railways Act was necessary but where "nondelivery" of goods was due to any other reason then no such notice was required.

In Mutsaddi Lal's case (E), the same Full Bench reiterated their point of view expressed in the earlier case by again stating that a notice u/s 77 was only necessary in a case where non-delivery was due to loss, destruction or deterioration of goods and not where non-delivery was due to any other cause, e.g. conversion, detention, misconduct, misdelivery, wrongful sale of goods, capricious acts etc. The question that has, therefore, to be determined is whether the plaintiff in this particular case sued on the allegation that the goods had been lost to the railway administration and, therefore, it meant loss to him and he wanted to be compensated for such a loss, or whether the plaintiff's case was that he had sustained loss because the railway administration had failed to deliver the goods to him.

There has unfortunately been a difference of opinion between the two learned Judges on this question as well. Mr. Justice Desai has taken the view that the plaintiff's case was one where he claimed compensation for the loss of the goods while Mr. Justice Beg was of opinion that the plaintiff's case was a simple case of compensation for non-delivery. A careful reading of the plaint leaves no doubt in my mind that the plaintiff's suit was one for "nondelivery" and not for loss of goods. In paragraph 3 of the plaint the plaintiff stated thus :

"That the goods in ordinary course should have reached the place of destination at Ghaziabad in about a week, but they never arrived there and were not delivered to the plaintiffs at all."

In paragraph 4 the plaintiff stated thus :

"That the whole of the said consignment which was placed in accordance with the railway tariff instructions has been lost and the railway administrations over which the said consignment was to travel have failed to deliver the same to the plaintiffs."

In paragraph 5 this is what was stated :

"That the loss of the said consignment has been caused on account of the misconduct on the part of the railway administration and its servants and they are liable in law to pay to the plaintiffs the price of the goods and also damages for non-delivery of the same in proper time."

65. It is no doubt true that in paragraphs 4 and 5 the plaintiff used, "lost" and "loss" respectively but these words in the two paragraphs were not used to assert that the goods had been lost to the railway. The plaintiff by the use of those words referred to above only conveyed his own sense of loss in respect of those goods. Indeed, the plaintiff could not state that the goods had been lost to the railway administration for that knowledge could not be available to the plaintiff. Even if the plaintiff heard rumours about riots and destruction of goods

in transit on certain railways even then no plaintiff could with certainty say that his goods had been lost in those riots.

It is in this connection important to notice that the railway administration even were unable to establish to the satisfaction of the Court below and even to that of my learned brother Desai J. that the goods had been lost because of the riot that took place at Barauni Railway Junction on a certain date in August 1942. The words of the plaint considered in the light of the circumstances mentioned above, leave no doubt in my mind that the plaintiff's suit was one for non-delivery and not for loss and therefore, in my view no notice was necessary to be given by the plaintiff to the railway administrations concerned. I would, therefore, answer the first question in the negative.

66. I shall now take up the second question, namely, whether the plaintiff's suit was barred by limitation. If I have read the decision of my brother Desai J. correctly, and I have no reason to think that I have not, he is of the opinion that the appropriate article which applied to the circumstances of the case was Article 30 of the First Schedule of the Limitation Act. Article 30 is as follows:

"Against a carrier for compensation for losing or injuring goods.

One year

When the loss or Injury occurs.

It will be clear that Article 30 applies only when the carrier loses or injures the goods and not when loss occurs to the plaintiff for some other fault of the carrier. I have already held that this was a suit for non-delivery of goods to the plaintiff and not for damages for the loss of the goods in the hands of the carrier. Therefore, in my opinion Article 30 will have no application.

67. Mr. Justice Beg was of the view that Article 31 applied to the facts and circumstances of the case. Article 31 is as follows :

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

One year

When the goods ought to be delivered."

68. The starting point of limitation under Article 31 is the point when the "goods ought to be delivered". Mr. Justice Desai in his judgment expressed the opinion that even if Article 31 were applicable to the suit even then the suit would be barred because according to the plaintiff's own case the goods should have been delivered within one week of their despatch from Jogbani and the suit having been filed more than one year beyond that date was barred by time. Reliance was placed on the allegations contained in paragraph 3 of the plaint. This paragraph I have already quoted in extenso and therefore, it is only necessary for my present purpose to refer only those words on which reliance was placed

by my brother Desai J, The words on which reliance appears to have been placed were, I think, these:

"The goods in ordinary course should have reached the place of destination at Ghaziabad in about a week."

69. The assertion contained in the afore-quoted words appears to have been made by the plaintiff in order to make out his contention that there had been non-delivery. These words to my mind could not be properly interpreted to mean that the plaintiff was fixing a point of time for the delivery of the goods. This allegation of the plaintiff could not, in any event, bind the carriers to a definite point of time for delivery, when there was no contract between the carrier and the consignor about this matter.

In cases where, on the contract between the parties, delivery is to be made by the carrier on a certain specified date then obviously that date would be the date when the goods ought to be delivered and in such cases limitation would run from that date. But, where there is no agreement between the carrier and the consignor in regard to the date of delivery then no specific date or specific time can be taken for purposes of saying when the goods ought to "be delivered, although, in cases where the plaintiff seeks compensation for delayed delivery then he may show that in normal course delivery should have been made by a certain time and the belated delivery about which the plaintiff complained was due to circumstances which did not exonerate the carrier.

The question, as to what exactly is the import of the phrase "when the goods ought to be delivered" had also been the subject of authoritative decision in the Full Bench case of Mutsaddi Lal v. Governor General in Council (E). In that case it was held that the phrase "ought to be delivered" in Article 31 of the Limitation Act meant "must be delivered". It was pointed out that the phrase "when the goods ought to be delivered" means a point of time at which a carrier undertakes to deliver the goods or the date when the carrier informs the consignee that the goods would be delivered or when the carrier communicates to the consignee its inability to deliver the goods or a reasonable date that may be fixed on a consideration of events subsequent to the handing over of the consignment to the carrier for carriage.

If the goods did not reach the destination on the day when in the normal course a consignee expected them to reach and the railway administration was thereupon approached for delivery in the hope that the goods were likely to be delivered or that the matter was being enquired into and there was no definite refusal by the railway administration then on the decision of the Full Bench in Mutsaddi Lal's case (E), the starting point of limitation under Article 31 could not be said to be the date on which the goods should have reached the destination in the normal course. I may here refer to a decision of Govinda Menon J. in The Governor-General in Council Vs. Khadi Mandali, .

In this case the learned Judge after clearly pointing out the distinction between

Articles 30 and 31 of the Limitation Act went on to hold. that in a suit against a railway company for compensation for non-delivery of goods consigned for transit, time begins to run under Article 31 of the Limitation Act from the date of definite refusal or declaration of inability to deliver by the railway company itself.

70. A large number of decisions have been cited and even relied on by my learned brother Desai J. to support his view in regard. to the point of time from which limitation has to be computed under Article 31. I do not consider it necessary to examine those cases because I am clearly of the opinion that we in this Court are bound by the Full Bench decision in Mutsaddi Lal's case (E). For the reasons given. above I would answer the second question also in the negative.

71. I now come to a consideration of the last question, namely, whether the defendant was exempt from liability under the terms of risk note H which had been executed by the plaintiff. It was held by Desai J. that "the appellant would not be held responsible for acts of violence done by the mob" and, therefore, he held that the defendant was exempt from liability according to the risk note. There appears to be no discussion in the judgment in regard to this question on which Desai J. held the view that the defendants' responsibility was curtailed.

Mr. Justice Beg was of the opinion that the question of the defendant's exemption from liability under risk note form H, could not, for the first time, be raised in appeal, for the question had not been raised in the trial Court and no issue on that question had been framed. The point was also not taken in the grounds-of appeal. It appears that the point was for the first time raised by counsel during the course of argument.

72. The relevant portion of risk note H is as follows:

".....do hereby agree and undertake to hold the said Railway Administration harmless, and free from all responsibility for any loss, destruction or deterioration of, or damage to, all or any of such consignments from any cause whatever, except upon proof that such loss, destruction, deterioration or damage arose from the misconduct of the Railway Administrations" servants; provided that in the following cases :

(a) Non-delivery of the whole of a consignment or of the whole of one or more packages forming part of a consignment packed in accordance with the instructions laid down in the Tariff or, where there are no such instructions, protected otherwise than by paper or other packing readily removable by hand and fully addressed, where such nondelivery is not due to accidents to trains or to fire;

(b) Pilferage from a package or packages forming part of a consignment properly packed as in (a), when such pilferage is pointed out to the servants of the Railway Administration on or before delivery; (It is not necessary for our purposes to quote further).

The Railway Administration shall be bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control and, if necessary, to give evidence thereof before the consignor is called upon to prove misconduct, but, if misconduct on the part of the Railway Administration or its servants cannot be fairly inferred from such evidence, the burden of proving such misconduct shall lie upon the consignor..."

73. From the above quotation from the risk note Form H it would be clear that the Railway Administration, before it could seek protection under the terms of risk note form H, have to disclose to the consignor as to how the consignment had been dealt with throughout the time it was in its possession or control and, if necessary, under the terms of the risk note form H, it was the obligation of the Railway to give evidence thereof before the consignor would be called upon to prove misconduct.

It was open to the Court in this case to have inferred misconduct on the part of the Railway Administration or its servants from the failure of the railway to give evidence as to how the consignment had been dealt with throughout the time it was in its possession and control. In this particular case there having been no issue on the question, there could be no evidence which could directly touch upon the question of the handling of the consignment by the Railway Administration during the time such consignment was in their possession and control.

It is, however, significant to note that in this particular case the Railway Administration asserted that the consignment had been lost because of mob violence at Barauni Junction on some date in August 1942. If the railway had proved that then undoubtedly they would have had just ground to say that they or their servants were not guilty of any misconduct. But both the trial Court and the learned Judges before whom this appeal came up for decision have come to the conclusion that the railway failed to prove the loss of goods through mob violence. At page 14 of his judgment (See para 7 above) Mr. Justice Desai said thus :

"It may be presumed from the normal course of events that the wagon reached Barauni on August 11 or 12 when disturbances were taking place there, but it would be a violent presumption that it was looted by a mob. The records at the railway station might have been destroyed during the violence, but those of neighbouring stations could have been produced to trace the journey of the train. But the failure of the appellant to prove that the consignment was looted by a mob at Barauni is immaterial because whether it was lost or not was not in controversy, the fact having been admitted by the respondent."

74. I may point out here that I am with great respect unable to share the opinion of Mr. Justice Desai that the loss of the consignment had been admitted by the respondents in the sense in which he interprets "loss". From what I have quoted above I think I am justified in assuming that Mr. Justice Desai upheld the

decision of the trial Court in so far as the question of the destruction of the plaintiff's consignment was concerned by looting.

The Railway Administration did not place before the Court evidence to show how the consignment had been dealt with throughout the journey as required by law. Desai J. pointed out that all that has been proved is that the wagon containing the consignment was attached to 163-Up which left Katihar Junction for Bara Banki at 3 p.m. on 11-8-1942 and that it did not reach Bara Banki. How far the wagon travelled has not been proved. There is no evidence whatsoever that it reached Barauni; much less is there any evidence that it was looted by a mob. A list of wagons looted at the railway station was prepared, but it has not been produced in the case and there is no evidence that it contained the number of the wagon in which the plaintiff's consignment travelled.

After having come to the afore-quoted finding I find it difficult to see how what my brother subsequently said could be appropriate, namely, that a presumption could be made that the wagon reached Barauni when the disturbances were taking place there. In my view the Railway Administration failed to place materials which they should have, and which they were under the law bound to, as to the way of handling of the consignment. The Court was, therefore, entitled to draw an inference of misconduct from such failure.

75. Further, I am in agreement with my learned brother Beg J. that this question of getting or not getting protection under the terms of risk note form H was dependent upon evidence which had to be led in the case. Since there was no issue on the question, no evidence on the matter could have been laid, in any event, by the plaintiff for discharging the onus that may be laid on them. So that, to permit the defendant, at the appellate stage, to raise the question for the first time would not only be unfair but legally unjustified. I would, for the reasons given above, answer the third question also in the negative.

76. Let this opinion of mine be laid before the Bench.

(In view of the opinion of the third Judge the Division Bench dismissed the appeal with costs.)