
(1977) 07 AHC CK 0020
In the Allahabad High Court
Case No : Second Appeal No. 3223 of 1967

Prem Prakash Gupta

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 06-07-1977

Acts Referred:

Constitution of India, 1950 — Article 141
Railways Act, 1890 — Section 77, 78B

Citation : AIR 1977 All 482

Hon'ble Judges : M.P. Mehrotra, J

Bench : Single Bench

Advocate : Jagdish Prasad and S.M.K. Chaudhary, for the Appellant; Gur Pratap Singh, for the Respondent

Final Decision : Allowed

Judgement

M.P. Mehrotra, J.—This second appeal arises out of a suit wherein the plaintiff initially claimed a certain amount for the non-delivery of goods which were entrusted to the Railways for being dispatched to him at Khekra, a Railway Station in the district of Meerut. During the pendency of the suit, a part of the consignment was delivered to the plaintiff and, therefore, he reduced his initial claim to a lower amount. The brief facts are these :--

On 27th December, 1961, M/s. Hindustan Steel Co. Ltd., Durgapur, booked a consignment of pig-iron from Durgapur Exchange Steel-yard, on the Eastern Railway. The destination was Khekra, a Railway Station on S. S. Light Railway in the district of Meerut. The railway receipt was sent to the plaintiff through the State Bank of India, Meerut and was handed over by the latter to the former after receiving full payment in respect of the consignment. The consignment was, however, not received till the first week of February, 1962. Notices u/s 77 of the Railways Act and Section 80, C. P. C. were served but the consignment was not delivered. The plaintiff alleged that the non-delivery was due to the carelessness, negligence and misconduct of the railway servants. A sum of Rs. 5,665.45 was

claimed as costs of the goods and Rupees 2,000/- was claimed on account of the loss of profit which the plaintiff suffered as a result of the non-delivery of the goods in question.

The total of the said two amounts worked to Rs. 7,665.45 but the plaintiff claimed Rs. 7,600/- only in round sum. As stated above, during the pendency of the suit, a part of the consignment was delivered to the plaintiff and, therefore, instead of the sum of Rs. 5,665.45 which had been initially claimed as costs of the goods, a sum of Rs. 2,481.44 was claimed as costs of the remaining undelivered consignment. The three defendants, in the suit were (1) Union of India (2) S. S. Light Railway Company Ltd., Saharanpur and (3) The Hindustan Steel Company Ltd., Durgapur, district Burdwan, West Bengal. The defendant No. 3 did not put in appearance and the suit proceeded ex parte against it. The other two defendants contested the suit and, inter alia, a plea was put in that the suit was bad on account of the absence of a valid notice u/s 77 of the Railways Act. Various other pleas were taken in denial of the plaintiff's claim but we are not concerned with the same in the instant appeal,

2. The trial court framed the necessary issues and tried the suit. It held that the plaintiff was not entitled to claim the sum of Rs. 2,000/- as loss of profit but he was entitled to claim the sum of Rs. 2,481.44 as costs of the undelivered part of the consignment. However no decree could be passed in the suit in favour of the plaintiffs as the trial court held that the service of notice u/s 77 of the Indian Railways Act had not been proved on the General Managers of the Eastern and the Northern Railways. The service of such a notice was, however, held to be proved in the case of S. S. Light Railway. On these findings, the suit was dismissed. The plaintiff went up in appeal and the lower appellate court dismissed the appeal and affirmed the trial court's decree. The plaintiff has now come up in the instant second appeal and in support thereof, I have heard Sri Rajeshwari Prasad and in opposition, Sri Gur Pratap Singh has made his submissions. The only point involved in the appeal is whether the plaintiff's suit was rightly dismissed on the ground that no notice u/s 77 was proved to have been served on the General Managers of the Eastern and the Northern Railway.

3. Old Section 77 of the Indian Railways Act laid down as under :--

"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."

4. By the Indian Railways (Amendment) Act, 1961 old Section 77 was replaced by new Section 78-B which lays down as under :--

"78-B. Notification of claims to refunds of overcharges and to compensation for losses. 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, damage, deterioration or non-delivery 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-

(a) to the railway administration to which the animals or goods were delivered to be carried by railway, or

(b) to the railway administration on whose railway the destination station lies, or the loss, destruction, damage or deterioration occurred,

within six months from the date of the delivery of the animals, or goods for carriage by railways ;

Provided that any information demanded or inquiry made in writing from, or any complaint made in writing to, any of the railway administrations mentioned above by or on behalf of the person within the said period of six months regarding the non-delivery or delay in delivery of the animals or goods with particulars sufficient to identify, the consignment of such animals or goods shall, for the purposes of this section, be deemed to be a claim to the refund or compensation."

5. The new provision came into effect on 1st January, 1972. It has been argued on behalf of the respondents and the argument was accepted in the courts below that the consignment was admittedly booked on 27-12-1961, therefore, the contract between the parties took place on the said date and the old law namely, Section 77, would govern the incidents of the said contract. On the other hand, it has been argued on behalf of the appellant that as the breach of the contract, namely, the non-delivery of the consignment, took place after 1st January, 1962 and the suit itself was filed on 22nd March, 1963, therefore, the new law namely, Section 78-B, would be applicable to the facts of the instant case. If the new law be held to be applicable, then as the notice has been admittedly held by the courts below to have been served on the S. S. Light Railway on whose line the destination station lay, therefore, there was compliance with the requirement of Section 78-B and the fact that no notice was proved to have been served on the General Managers of the Eastern and the Northern Railway was of no consequence.

I may here first deal with an aspect of the matter which touches on the interpretation of the new Section 78-B. The lower appellate court has expressed its opinion though somewhat half-heartedly that in case the destination station lies on a railway which is owned by a body which is different from the one which owns the railway at the booking station, then notice u/s 78-B should be separately sent to the owners owning the railways at different stations. In my opinion, this interpretation cannot be sustained on the language of Section 78-B. The new provision was enacted with a view to soften and, mitigate the requirement embodied, in the old Section 77 whereby notices had to be sent to each Railway Administration. The expression "Railway Administration" has been

defined in Section 3 (6) of the Railways Act as follows :

" "Railway administration" or "administration", in the case of a railway administered by the Government means the manager of the railway and includes the Government and in the case of a railway administered by a railway company means the railway company."

6. The purpose of the amendment effected by the Amendment Act of 1901 was to enable the claimant to serve one notice only either on the railway administration owning the railway at the booking station or on the railway administration owning the railway on whose line the destination station lies or in case the claimant knew the place where the loss, destruction, damage or deterioration occurred, then on the railway administration which owned the railway where the loss, damage, destruction or deterioration took place. Thus the new Section 78-B gives a choice to the aggrieved person to serve notice on any one of the three railway administrations. The lower appellate court acted in contravention of the well known rules of interpretation when it sought to put its own gloss on a provision whose language is absolutely clear and unambiguous. By the interpretation which the lower appellate court put on Section 78-B, it would be incumbent on the aggrieved person to give two notices where the ownership of the railway at the booking station and at the destination station belongs to separate owners.

However, the section as it stands, does not, at all advert to the question of the ownership of the railway administrations and does not say that in the case of different ownership, notices must be sent separately to each of the different owners. On a plain reading of the section, it is clear that notice has to be sent to one of the three railway administrations who may come into the picture, namely, the railway administration owning the booking station, that owning the destination station and the third one owning the railway on which loss, destruction, deterioration or damage took place. In my view, therefore, in the instant case, if it be held that the new provision contained in the new Section 78-B would be applicable then the plaintiff's suit has to be decreed inasmuch as it is the findings of both the courts below that a notice of claim was served on the S. S. Light Railway on which the destination station happened to be situated.

7. However, the more difficult question to be decided is whether in the facts of the instant case, the claimant was to serve notices on different railway administrations under the old Section 77 or it was open to him to serve only one notice on one of the three railway administrations as required by the new Section 78-B. The contract undoubtedly took place before the new provision came into force as stated above, the consignment was booked on 27th December, 1961 but the breach, namely the non-delivery of the goods occurred after 1st January, 1962 when the new provision contained in Section 78-B became effective. The suit itself was filed on 22nd March, 1963 when undoubtedly the new provision stood enforced. The lower appellate court has observed:--

"The settled and the general principle governing contracts is that every contract should be deemed to have been made with reference to the law in force at the time of its making. Laws which subsist at the time when a contract is made, form part of the contract and the parties should be deemed to have entered into a contract accepting these terms All rights and obligations rising under a contract are determined by the law in force at the time when it is entered into."

8. In my opinion, this statement does not lay down the correct law. It is true that sometimes by statute certain terms are held to be incorporated in contracts but this is so only when by statutory enactment, certain terms and conditions are made the part of the contract. There is no statutory provision in the Railways Act which might provide that the requirement of giving a proper notice, whether under the old Section 77 or under the new Section 78-B of the Indian Railways Act, would form a part of a contract between the railway and the consignor or the consignee of the goods contracted to be carried to the destination station by the railway administration. The fact that the statute imposes certain requirements to be fulfilled before a suit can be filed against the Govt. or its officials or against the Union of India owning the different railway administrations, does not mean that the statutory requirement itself becomes a part of the contract between the parties.

For example, when a notice u/s 80, C. P. C. has to be served before a suit is filed against the Government or its officer, it cannot be contended that in every contract to which the Government or its officer is a party, it should be deemed to be an implied term of the contract that such a notice will have to be served before the institution of the suit. The notice has to be served on account of the requirement of law and if such a notice is not served, then the suit is bad on account of the failure to comply with the requirement of law and it will not be bad on account of any breach of contract or any so called implied condition. I think the same is the position with regard to a notice u/s 77 of the Indian Railways Act. If no notice is given, then the parties cannot be held to be in breach of the contract but the suit will not lie because of the failure to comply with the statutory requirement.

9. The lower appellate court has further observed that the question of giving notice is not merely a matter of procedure. It has held that "The requirement of giving a notice is a matter of substantive law and cannot be said to be a matter of procedure only." I have to examine the correctness of this proposition.

10. In *State of Seraikella Vs. Union of India (UOI) and Another*, the question was whether a suit which had been filed on 16th January, 1950 by a Ruler of an Orissa State in the Federal Court of India against the Dominion of India and the Province of Bihar was entertainable by the Supreme Court when the latter came into existence as a result of the enactment of the Constitution of India. Various pleas were taken in defence questioning the maintainability of the suit and issues were struck on the basis of the said pleas. Mahajan, J., held that the suit was maintainable but the other learned Judges held that the Supreme Court had no

jurisdiction to entertain the suit. Issue No. 5 struck in the suit was "whether the suit is maintainable in view of the absence of the requisite notice to the defendant u/s 80 of the Civil P. C. ?"

The majority opinion did not express any opinion on this issue but the minority opinion, as expressed by Mahajan J., did examine this issue and answered it in the negative. In my view, in a situation where the majority of the Judges of the Supreme Court expressly chose not to examine a particular issue and decided the suit on certain other grounds, then the expression by the minority on such an issue can be said to have a binding force on the courts in India. In this view of the matter, I think the observations made by Mahajan J., are binding on me. That learned Judge laid down as follows :--

"Section 80 does not define the rights of parties or confer any rights on the parties. It only provides a mode of procedure for getting the relief in respect of a cause of action. It is a part of the machinery for obtaining legal rights, i. e. machinery as distinguished from its products. Vide *Poyser v. Minors*."

11. In my view, in view of the said statement of law, the lower appellate court was wrong in thinking that Section 77 of the Indian Railways Act created any kind of a substantive right and obligations between the parties. The provision was merely procedural and, therefore, when on 1st January, 1962, it was replaced by Section 78-B, then it cannot be argued that any substantive rights and obligations created by the repealed Section 77 remained intact and unaffected by the enactment of the new provision. If Section 77 was merely procedural, then the procedure which was in operation on the date of the suit would govern the suit. On the date when the suit was filed, undoubtedly Section 78-B was in operation and, therefore, the said provision would be applicable to such a suit and not the provision contained in the repealed Section 77 which ceased to have effect from 1st January, 1962. The lower appellate court itself recognised that procedural amendments or enactment have a retrospective operation.

In this view of the matter, even if it were to be accepted that it was an implied term of contract between the parties, that a notice would be served under the Railways Act, then as the so called implied term would pertain to a mere procedural matter, therefore, the new Section 78-B will, by the retrospectivity of its operation, wipe out the so called implied term. Of course, I have already held that the requirement of giving a notice u/s 77 could not be deemed to be an implied term of the contract but I am holding that even if I am wrong in my thinking, still, the implied term would not be that a notice would have to be served on the railway administrations u/s 77 but the implied term would be that as the requirement of notice is a procedural matter, therefore, such a notice would have to be served as would be required to be served on the date when the suit is instituted.

12. In *Ishmal Haji v. Gondal Rly.* AIR 1951 Sau 16, a Division Bench laid down as

follows :--

"As regards notice u/s 80 the court has to see as to what the law was on the date of the suit. If the plaintiff wanted to make the Jodhpur Railway liable he ought to give notice under S- 80 and further a fresh notice after its merger."

13. In Union of India and Another Vs. Landra Engineering and Foundry Works and Another, , a Full Bench of the said Court followed the law laid down by Mahajan, J. in the aforesaid Supreme Court pronouncement reported in State of Seraikella Vs. Union of India (UOI) and Another, .

14. In Bhagwan Lal Vs. Union of India(UOI) and Others, , a learned Judge of the said court observed as under :

"Section 80 enacts only a rule of procedure, and the object of the Legislature in requiring the notice under the section is to afford the defendant an opportunity to reconsider his position with regard to the claim made, and to make amends or settle the claim, if so advised, without recourse to the trouble and cost of litigation."

15. In Niranjana Agarwalla Vs. Union of India (UOI), , Division Bench laid down as under :--

"Notice u/s 80 is not a part of the plaintiff's cause of action although it is a condition precedent which must be pleaded and, if necessary, proved, unless waived, before a suit can be instituted and maintained against the Government."

16. In Ram Sundri alias Sham Sundri Vs. Collector, Ludhiana and Others, , a learned Judge of the said court, following the law laid down by Mahajan, J. in State of Seraikella Vs. Union of India (UOI) and Another, held that Section 80 only provides a mode of procedure for getting the relief in respect of a cause of action and that it does not define the rights of parties or confer any rights on them.

17. In an old case reported in Hargul Mal v. Mohammad Ata Elahi Khan AIR 1937 Lah 41 it was observed with reference to Section 54, U. P. Court of Wards Act as follows :--

"The wording is similar to that of Section 80, Civil P. C. which requires two months' notice to be given of a suit against the Secretary of State in Council. I find it stated in Chitale and Annaji Rao's CPC that this section (i. e, Section 80) like Section 79 enacts only a rule of procedure. With this view I agree and after a prolonged search I have been unable to find a suggestion in any case or text-book that an enactment requiring notice of legal proceedings to be given before the institution of such proceedings is a provision of substantive law."

18. The aforesaid cases, though they have held that Section 80, C. P. C. is a matter of procedure are apposite in connection with Section 77 of the Railways Act also. Section 77 certainly did not stand on a higher footing than Section 80, C. P. C. If Section 80 does not bring into existence substantive rights and

obligations between the parties, much less could old Section 77 of the Railways Act bring into existence any substantive rights or obligations between the parties.

19. Learned counsel for the parties have referred to certain other cases but so far as the present controversy is concerned, I have not found much of assistance in the said cases. These cases are as follows:

In *Jetmull Bhojraj Vs. The Darjeeling Himalayan Railway Co. Ltd. and Others*, , it was laid down that notice under the old Section 77 had to be given to every railway administration against whom the suit was eventually filed. It was also laid down that the notice u/s 77 should be construed liberally.

20. In *Union of India (UOI) Vs. Haji Jiwakhan*, , it was laid down by a learned single Judge that notice under the old Section 77 was mandatory and such notice was necessary in all cases whether it was a case of deterioration, loss or non-delivery. Reliance was also placed on *Governor General in Council Vs. Musaddi Lal*, .

21. In *Union of India (UOI) Vs. Bhagat Ram*, , it was laid down that Section 80 of the Railways Act (before its amendment by Act 39 of 1961) was a provision relating to substantive law and not dealing with procedure of courts. Hence its amendment by the amending Act 39 of 1961 was not retrospective. In the instant case, we are not concerned with the old Section 80 of the Railways Act but with the old Section 77 of the Railways Act.

22. In *The Union of India (UOI) Vs. Firm Banshidhar Prem Sukh Dass and Another*, , it was laid down that the notice under the old Section 77 was required to be served within six months so as to reach the railway authority in the ordinary course of time within six months and that in considering the effect of Section 140 (c) of the Railways Act the provisions of Section 142 (2) of the said Act had got to be considered.

23. In *The State of Kerala Vs. The General Manager, Southern Railway, Madras*, , it was laid down that a suit would not lie against the manager of railway administration. It has to be brought against the owner of the Railway administration. Hence in the case of railway administration owned by the Central Government, the suit had to be brought against the Union of India.

24. In *Firm Deekishan Srigopal Vs. Union of India (UOI) (Formerly Dominion of India) and Others*, , a learned single Judge of this court laid down that where the consigned goods passed over different railway administrations in transit, a notice to one of the railway administrations would meet the requirements of the old Section 77. In my view, this statement is contrary to the law laid down in *Jetmull Bhojraj Vs. The Darjeeling Himalayan Railway Co. Ltd. and Others*, where it was held that notice under the old Section 77 had to be given to every railway administration against whom the suit was eventually filed. However, the point is not material as I have held that the old Section 77 did not apply to the facts of the instant case.

25. I am, therefore, of the view that Section 78-B applied to the facts of the case and in terms of the new enactment in the said provision, a notice served on the S. S. Light Railway by the plaintiff notifying his claim should be deemed to be satisfactory compliance with the mandatory provision of law contained in Section 78-B. The destination station was situated on the railway line owned by the said railway and, therefore, it was not material that the General Manager of the Eastern Railway and the Northern Railway were not separately served with the said notice.

26. No other point was argued before me. I, therefore, allow the appeal, set aside the judgments and the decrees of the courts below and decree the plaintiff appellant's suit for Rs. 2,481.44 with pen-dente lite and future interest at the rate of 6% per annum and with full costs throughout against the defendant-respondent No. 1, Union of India. The suit shall stand dismissed against the defendant-respondent No. 2, Hindustan Steel Company Ltd. So far as the second respondent is concerned, the costs shall be as between the parties throughout.